STATEMENT OF THE FACTS

Dr. Janet Davis is a former researcher with DNA-Track, a company that analyzes customers' DNA and returns to them information about their ancestral biology. (R. at 1). Cybersecurity experts at DNA-Track discovered last year that certain data sets its research program had been using were downloaded to an external hard drive in violation of a company policy. (R. at 1–2). In response, DNA-Track launched an internal investigation and alerted the FBI. (R. at 1–2). The FBI sent Agent Earl Fletcher to speak with DNA-Track, and the company sought to keep this development secret from its research division employees, such as Dr. Davis. (R. at 2). Dr. Davis became a suspect of the investigation because she had reportedly become disgruntled with the company's priorities and leadership, her colleagues believed she might leave and start her own company, and she worked with the data sets often. (R. at 2).

Agent Fletcher believed that Dr. Davis was the culprit, and thought that the violation of the company policy might also violate 18 U.S.C. § 1030(a), a section of the Computer Fraud and Abuse Act (hereinafter "CFAA"). (R. at 3). The relevant section provides penalties for anyone who "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains information from any protected computer." 18 U.S.C. § 1030(a) (2008). Agent Fletcher believed that Dr. Davis, by violating a company policy, may have "exceeded authorized access" within the meaning of the CFAA. (R. at 3).

PROCEDURAL HISTORY

Dr. Davis was charged with violating 18 U.S.C. § 1030(a)(2)(C) for violating a company policy by downloading data sets to an external hard drive. (R. at 3). The United States seeks the maximum statutory penalty of five years' imprisonment, as the value of the information exceeds $5,000. (R. at 3); *see also* 18 U.S.C. § 1030(c)(2)(B). Dr. Davis motioned to dismiss the §

1030(a)(2)(C) charge as a matter of law. (R. at 3–4). The United States District Court for the District of Lile denied the motion, finding that "exceeds authorized access" in § 1030(a)(2)(C) should be interpreted broadly. (R. at 6, 8). The Twelfth Circuit granted certiorari to consider whether "exceeds authorized access" in § 1030(a)(2)(C) includes misuse of information that a defendant had lawful access to. (R. at 9).

ARGUMENT

I. The 18 U.S.C. § 1030(a)(2)(C) charge should be dismissed because the term "exceeds authorized access" does not include misuse of access.

This court should reverse the denial of the motion to dismiss the 18 U.S.C. § 1030(a)(2)(C) charge because the District Court erred in its judgment. First, this court should find that the plain meaning of the language "exceeds authorized access" in the Computer Fraud and Abuse Act (hereinafter, CFAA) refers to accessing information that is categorically off-limits. Second, even if the court finds § 1030(a)(2)(C) to be ambiguous, the presumption against superfluity, the drafting history, and the rule of lenity should compel the court to read this phrase in favor of Dr. Davis. Third, even if the court accepts the government's interpretation that "exceeds authorized access" includes misuse of access otherwise granted, the court should still reverse the ruling because the presumption against absurdity is compelling enough to rebut the presumption of plain meaning. While this is an issue of first impression for the Twelfth Circuit, it has been considered by other federal courts of appeals. *See, e.g.*, *United States v. Valle*, 807 F.3d 508, 528 (2d Cir. 2015) (finding that "exceeds authorized access" does not include one's misuse of access to obtain information they were authorized to obtain); *United States v. Nosal*, 676 F.3d 854, 864 (9th Cir. 2012) (same); *WEC Carolina Energy Solutions LLC v. Miller*, 687 F.3d 199, 207 (4th Cir. 2012) (same). *But see United States v. Rodriguez*, 628 F.3d 1258, 1263 (11th Cir.

2010) (finding that Section 1030(a) applies to misuse of access); *United States v. John*, 597 F.3d 263, 272 (5th Cir. 2010) (same).

A. The plain language of the CFAA unambiguously supports Dr. Davis' interpretation.

The court should find that the language of § 1030(a)(2)(C) unambiguously supports the position that Dr. Davis' conduct is not prohibited. The plain meaning of "exceeds authorized access" means to access categorically unauthorized information. Therefore, the court should reverse the ruling of the District Court.

The text of the CFAA defines the relevant offense. Section 1030(a)(2)(C) is violated when one "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains…information from any protected computer." "[E]xceeds authorized access" is defined as to "access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." § 1030(e)(6).

The plain language is the beginning of any statutory interpretation. *See, e.g.*, *Perrin v. United States*, 444 U.S. 37, 42–43 (1979); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 16 (1st ed. 2012). When words are not defined, as is the case with § 1030(a)(2)(C)'s "authorized," the court gives the words "their ordinary, contemporary, common meaning." *Perrin*, 444 U.S. at 42. When confronting this term, the Second Circuit found that "authorized" as used in the CFAA is unambiguous. *United States v. Morris*, 928 F.2d 504, 511 (2d Cir. 1991); *see also United States v. Valle*, 807 F.3d 508, 524 (2d Cir. 2015) ("Authorization is a word of common usage, without any technical or ambiguous meaning… [and] common usage of authorization suggests that one access a computer without authorization to do so at all."); *accord LVC Holdings, LLC v. Brekka*, 581 F.3d 1127, 1132–33 (9th Cir. 2009). Moreover, the definition of "authorization" is "[o]fficial permission to do something; sanction or warrant."

Authorization, Black's Law Dictionary (10th ed. 2014). Therefore, in interpreting the statute, "without authorization" applies when one gains admission to a computer without prior approval at all.

To understand how "exceeds authorized access" is to be interpreted, "exceed" must be defined. "Exceed" means "to extend outside of," "to go beyond a limit set by // exceeded his authority." Merriam-Webster, *Exceed*, https://www.merriam-webster.com/dictionary/exceed (last visited Feb. 21, 2019). Further, "exceed" is defined as to "[g]o beyond that is allowed or stipulated by (a set limit)." Oxford English Dictionary, https://en.oxforddictionaries.com/definition/exceed (last visited Feb. 21, 2019). As an extension, to exceed authorization would be to go beyond the set limit for the person accessing the material. Naturally, the phrase "exceeds authorized access" refers to the situation where someone has prior access and "obtains information" that is categorically off-limits. *See WEC Carolina Energy Sols. LLC v. Miller*, 687 F.3d 199, 204 (4th Cir. 2012). Therefore, § 1030(a)(2)(C) does not prohibit the conduct of Dr. Davis, putting the burden on the government to rebut that presumption based on the plain meaning.

B. Even if this court were to find § 1030(a)(2) to be ambiguous, the presumption against superfluity, the legislative history, and the rule of lenity weigh the determination in Dr. Davis' favor.

Even if the court were to find this statute to remain ambiguous, the court should still find in favor of the narrower interpretation because the government's interpretation is superfluous. Furthermore, the drafting history of the CFAA shows an intent to narrow the construction, and in a tie, the rule of lenity should compel the court to rule in favor of a criminal defendant.

1. The government's interpretation would create superfluity within the CFAA.

The presumption against superfluity is dispositive if the court finds § 1030(a) to be ambiguous. The District Court found that the phrase "exceeds authorized access" would be made superfluous with Dr. Davis' interpretation. (R. at 7). But the opposite is indeed true. When a statutory provision is ambiguous, and one of the two possible interpretations would create a superfluous result, the court assumes that Congress intended to give meaning to each provision. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citations omitted) ("It is our duty to give effect, if possible, to every clause and word of a statute."). To understand how the Government's interpretation would result in surplusage, it is important to examine a similar provision, §1030(a)(4).

The government's interpretation would make § 1030(a)(2)(C) superfluous with § 1030(a)(4) and § 1030(a)(4) with itself. Section 1030(a)(4) is satisfied by: intentionally accessing a protected computer without authorization or in a way that "exceeds authorized access" to a value of not more than $5,000–lest the crime be aggravated–with intent to defraud with a sentence of up to five years. Section 1030(a)(2)(C) is violated by intentionally accessing a protected computer without authorization or in a way that "exceeds authorized access," with a sentence of up to five years. If violating a company's policy can suffice, and because using company property with the intent to defraud is almost certainly against company policy, for § 1030(a)(4), the element of the intent to defraud will necessarily satisfy the attendant circumstance of lack of authorization. As such, violating § 1030(a)(4) would always meet the requirements of § 1030(a)(2)(C). Given that these two crimes are not merely degrees of a type of offense, but rather are meant to complement each other, the government's position would have the court find that Congress drafted one crime and then drafted another that would always be satisfied by the other with the same amount of sentencing.

Dr. Davis' interpretation, on the other hand, would have "exceeds authorization" include situations where one is authorized to access a computer but obtains information that they are not authorized to obtain. Furthermore, "without authorization" would encompass situations where one is not authorized to access the computer at all. Therefore, Dr. Davis' interpretation does not make § 1030(a) superfluous. Subsequently, given the presumption against superfluity, the court should choose Dr. Davis' interpretation over the government's.

2. The legislative and drafting history shows that Congress intended to establish the narrow interpretation of the CFAA.

Even if the court does not find the Government's interpretation to be superfluous, the legislative history shows an intent for "exceeds authorized access" to apply only to those who obtain information that is categorically off-limits. Furthermore, the drafting history also sheds light on Congress' intent.

A look at the drafting history and the stated purpose for amending the statute points to a narrow reading of "exceeds authorized access." The former version of the Act defined "exceeds authorized access" as "having accessed a computer with authorization, uses the opportunity such access provides for purposes to which such authorization does not extend." Pub. L. No. 99–474, § 2(c), 100 Stat. 1213 (1986). This language was subsequently amended to its current version. The Senate Committee Report explaining the purpose for that change states that:

> [E]liminat[ing] coverage for authorized access that aims at '*purposes* to which such authorization does not extend.' This removes from the sweep of the statute one of the murkier grounds of liability, [where one's] access to computerized data might be legitimate in some circumstances, but criminal in other (not clearly distinguishable) circumstances that might be held to exceed his authorization.

S.Rep. No. 99–432, at 21 (1986) (emphasis added). The report further explained that it was not necessary for the CFAA to address misuse of authorization *Id.* at 21 ("[A]dministrative sanctions should ordinarily be adequate to deal with real abuses of authorized access to … computers.").

Therefore, the drafting history shows that Congress intentionally excluded conduct such as that of Dr. Davis from being included in CFAA's prohibitions.

Legislative history shows that Congress had trespass, or hacking, in mind for § 1030. Congress' motivation was specifically to combat computer crime. *See* H.R.Rep. No. 98-894 (1984) ("Compounding this is the advent of the activities of so-called 'hackers' who have been able to access (trespass into) both private and public computer systems…"); *see also United States v. Valle*, 807 F.3d 508, 525 (1st Cir. 2015). The report described the growing nature of this problem as "[t]he personal computer allows its user to employ the power of the computer to break into other computer systems by systematically speeding up what would otherwise be a slow, hit or miss process." H.R. Rep. No. 98-894, 10. The danger that Congress saw was not that one would violate her company's policies, but rather that one would obtain information that was intentionally protected.

To fight these dangers, Congress passed legislation tailored to include such conduct. After comparing the crime to "mugging a little old lady and taking her pocketbook," the report mentioned two cases as specific examples of this conduct in action. H.R. Rep. No. 98-894, 6. The first involved a former employee "tapping into" a computer system, and the other was a former employee of the Federal Reserve "attempt[ing] to continue to access information in the federal reserve board's money supply … without authorization." *Id.* at 6. The First Circuit noted that the report stated that "the conduct prohibited is analogous to that of 'breaking and entering.'" *Valle*, 807 F.3d at 525; *see also* H.R.Rep. No. 98–894, at 20. All of these concerns both center around the concept of breaking into information that was categorically unauthorized to be accessible to the person while being notably silent people misusing their authorization. Dr.

Davis did not break into her company's system, did not access information that she was not permitted to access, and therefore did not "trespass" electronically.

3. The rule of lenity requires that this court show leniency to Dr. Davis, a criminal defendant.

The court should apply the rule of lenity when analyzing § 1030(a)(2)(C) if it finds the statute to be ambiguous. When a statutory provision is criminal, the rule of lenity is to be applied when "ordinary tools of legislative construction fail to establish that the government's position is unambiguously correct," and as a result, the court "adopt[s] the interpretation that favors the defendant." *United States v. Valle*, 807 F.3d 508, 526 (2d Cir. 2015); *accord Leocal v. Ashcroft*, 543 U.S. 1, 11 n. 8 (2004) (ruling this to be the case even when the statute has a civil remedy as well); *Moskal v. United States*, 498 U.S. 103, 108, 111 (1990). The rule of lenity is a normative canon, emphasizing the policy goal of avoiding overbreadth in criminal statutes. *See, e.g., Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (citing *Liparota v. United States*, 471 U.S. 419, 427 (1985)) ("Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability."). More precisely, the rule of lenity encourages courts to "construe th[e] criminal statute strictly and avoid interpretations not clearly warranted by the text." *E.g., WEC Carolina Energy, LLC v. Miller*, 687 F.3d 199, 204 (4th Cir. 2012) (finding that the rule of lenity compels the court to interpret § 1030(a)(2)(C) narrowly).

If the court finds the text of § 1030(a)(2)(C) to be ambiguous, the rule of lenity applies as a tie-breaker, because § 1030(a)(2)(C) is a penal law. While Congress has the power to proscribe a broader range of behavior, before Dr. Davis spends up to five years in federal prison, Congress must do so clearly. Therefore, even if the court finds § 1030(a)(2) to be ambiguous, Dr. Davis

should still prevail. The presumption against superfluity is sufficient to resolve any ambiguity. In addition, the drafting history makes Congress's intent clear, and the rule of lenity imposes a burden on the government that they fail to satisfy. Consequentially, the court should reverse the ruling of the District Court.

C. Even if the court finds that the CFAA should be read to include Dr. Davis' conduct, the presumption against absurdity should compel the court to reverse the District Court.

The court should limit the application of § 1030(a)(2)(C) even if the plain meaning were to indicate otherwise because the government's proposed reading would lead to an absurd result. If the court were to construe the CFAA as a general misappropriation statute, not only would it cover the conduct of Dr. Davis, but it would also reach as far as to include everyday actions that Congress did not consider. As such, the court should limit the application of the CFAA to accessing information beyond one's authorization permits them.

The presumption against absurdity has deep roots in American and English jurisprudence. *See Church of the Holy Trinity v. United States*, 143 U.S. 457, 472 (1892) (finding that facially unambiguous immigration laws were not intended to prevent pastors from receiving funding to relocate). In *Riggs v. Palmer*, for instance, the General Assembly of New York had not provided an exception in the wills and estates statute for when the deceased was criminally killed by an heir, but the court found that it would be absurd for a murderer to be allowed to benefit from his wrongdoing. 115 N.Y. 506, 511 (1889). The court found that, had the General Assembly considered the issue, it would have included an exception for this case. *Id.* This presumption dates further back and was popularized by William Blackstone. *See* 1 Blackstone's Commentaries 91 ("Where some collateral matter arises out of the general words [of a statute], and happens to be unreasonable, there the judges are in decency to conclude that this

consequence was not foreseen… and there they are at liberty to expound the statute by equity…"). After all, a statute that proscribes drawing blood in the street should not apply to a barber who unintentionally caught a customer, nor should acts of charity or necessity be punished for occurring on the Sabbath. *See Riggs*, 115 N.Y. at 511.

While the plain meaning of the words in a statute is always the first step, the plain-meaning rule is a presumption that can be rebutted by absurdity. *See* John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2389–90 (2003) ("The absurdity doctrine builds on that idea: If a given statutory application sharply contradicts commonly held social values, then the Supreme Court presumes that this absurd result reflects imprecise drafting that Congress could and would have corrected had the issue come up during the enactment process."). Therefore, when a statute uses general language, an absurd result can provide a basis for deviating from the plain-meaning rule.

If the court were to interpret "exceeds authorized access" to include situations where the accused had authorized access but misused it, such an interpretation would spill over into a wide array of life activities. Section 1030(a)(2) forbids, among other things, exceeding authorized access that results in obtaining "information from any protected computer." A "protected computer" is any that "is used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States." § 1030(e)(2). The Ninth Circuit noted that such a definition of a protected computer can encompass "nearly all desktops, laptops, servers, smart-phones, as well as any 'iPad, Kindle, Nook, X–box, Blu–Ray player or any other Internet-enabled device,'…even some thermostats qualify as 'protected.'" *United States v. Nosal*, 844 F.3d 1024, 1050 (9th Cir. 2016). Given the broad definition of "protected

computer," an expansive interpretation of "exceeds authorized access" would have the CFAA regulate conduct far beyond which Congress could have imagined.

If "exceeds authorized access" were to apply to misuse of authorized access generally, it would apply to make nearly every employee with a desk job a criminal. Not even the most diligent worker is innocent of occasionally being distracted, but once a computer is involved, the government could impose criminal liability. Imagine, for instance, a company policy that forbids employees from using their work computers for personal use, a reasonable rule often tucked-away in employment contracts. An employee who kindly thanks his friend for birthday wishes while on a work computer could be prosecuted under the CFAA.

But this is not limited to the workplace. This time imagine that an elderly couple has a joint Facebook account to enjoy keeping up with their grandchildren. Facebook authorizes users to access certain information from their servers that clearly affect interstate commerce, subject to their terms and conditions, which prohibit "[s]haring an account with any other person." Facebook, Inc., *Community Standards: Misrepresentation*, https://www.facebook.com/communitystandards/misrepresentation (last visited Feb. 19, 2019).

With the government's interpretation, both can be found guilty under § 1030(a)(2)(C) with a one-year sentence or more, because by sharing an account, they have exceeded the access that Facebook authorized. *See* § 1030(c)(2)(A). In contrast, under Dr. Davis' interpretation, the employee can be disciplined by their employer, and the couple would only be criminals if they found a way to hack into Facebook's servers. The House of Representatives appears to favor living on the latter rule. After all, the House Ethics Manual exempts Members of the House for similar conduct. Comm. on Standards of Official Conduct, 110th Cong., *House Ethics Manual* 197 (2008) (emphasis added) ("House resources acquired with such funds – including the office

telephones, computers … are to be used for the conduct of official House business. … A provision of the rules issued by the House Administration Committee *allows minor, incidental personal* use of House equipment and supplies.").

The presumption against absurdity, while rarely invoked, serves a vital role in statutory interpretation. The government's interpretation would turn the even the most mundane of offices into crime centers. Dr. Davis' interpretation is sensible, does not criminalize a scathingly large portion of the population, and yet remains broad enough to encompass the targeted abusive computer practices. While the government may paint this argument as a parade of horribles, claiming that no prosecutor would ever bring such a case, "[a] court should not uphold a highly problematic interpretation of a statute merely because the Government promises to use it responsibly." *United States v. Valle*, 807 F.3d 508, 528 (2015) (citing *United States v. Stevens*, 559 U.S. 460, 480 (2010)).

This court should grant the motion to dismiss because no matter how the court approaches the statute, Dr. Davis' interpretation prevails. The plain language of the statute unambiguously supports a narrow reading. But even if it is found to be ambiguous, the presumption against superfluity, the legislative history, and the rule of lenity compel the narrow reading. Finally, even if the language tends towards a broader reading of the statute, such a result would be absurd to the point that the court should still refuse to read § 1030(a)(2) broadly. In sum, the United States Court of Appeals for the Twelfth Circuit should reverse the United States District Court for the District of Lile, and grant Dr. Davis' motion to dismiss the § 1030(a)(2)(C) charge.

Applicant Details

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Applicant Education

BA/BS From	**Lindenwood University**
Date of BA/BS	**December 2018**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 1, 2022**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**The George Washington Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk **Yes**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 12, 2021

The Honorable Elizabeth W. Hanes
United States District Court for the Eastern District of Virginia
Spottswood W. Robinson III and Robert R. Merhige Jr. Federal Courthouse
701 East Broad Street
Richmond, Virginia 23219

Dear Judge Hanes:

I am a rising third-year law student at The George Washington University Law School and Managing Editor of the George Washington Law Review. I am writing to apply for a clerkship in your chambers for the 2022 term. As a native of Richmond, I welcome the opportunity to begin my legal career serving such a wonderful city. Please find a resume, writing sample, and law school transcript, enclosed. Letters of recommendation from The George Washington Law School professors Sonia Suter and Christy DeSanctis will follow.

Please do not hesitate to contact me at the above address, email, or telephone number if you should need any additional information. Thank you for your consideration.

Respectfully,

Brayden J. Parker

Enclosures

Brayden Jack Parker

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EDUCATION

The George Washington University Law School Washington, D.C.
Juris Doctor Expected May 2022
Cumulative GPA: 3.769, George Washington Scholar (top 15% of class as of Fall 2020)
Activities: *The George Washington Law Review* (Managing Editor (2021-22), Member (2020-2021), Personal Statement Review Committee (2021)); *Federal Communications Bar Association* (Member)

Lindenwood University St. Charles, Missouri
Bachelor of Arts, *summa cum laude,* in Historical Studies December 2018
Minor in Public History, Minor in Visual Culture and History
Activities: *Lindenwood University Football* (Student Athlete, 2014–2018); *Unity Council* (2017–2018)
Honors:

- Lindenwood University Vice President's Award Spring 2017—Spring 2019
- Lindenwood University Dean's List Fall 2014—Fall 2019
- Mid-American Intercollegiate Athletic Conference Academic Excellence Award 2014-2018

EMPLOYMENT HISTORY

United States Attorney's Office for the District of Columbia Washington, D.C.
Legal Intern Beginning September 2021

Telecommunications Law Professionals, PLLC Washington, D.C.
Summer Associate May 2021—Present

- Circulate client alerts to update parties on pending legislation, agency actions, and relevant litigation
- Canvass all 50 states' telecommunication statutes and regulations to ensure client compliance
- Recommend substantive and technical edits on draft petitions and comments filed with FCC

Superior Court of the District of Columbia Washington, D.C.
Judicial Intern, The Honorable Gerald I. Fisher January 2021—April 2021

- Analyzed COVID-19 compassionate release motions and drafted orders and bench memorandums
- Produced detailed notes of hearings and arguments for Judge's use while drafting decisions
- Summarized motions and updated attorney contact forms to prepare Judge and chambers for hearings

The George Washington University Law School Washington, D.C.
Dean's Fellow, Fundamentals of Lawyering Program August 2020—May 2021

- Created legal writing and citation literacy curriculum and deployed by teaching class once a week
- Mentored first-year students by conducting office hours and professional development training
- Supported professor in administrative duties, acted as liaison between professor and students

Federal Communications Commission Washington, D.C.
Legal Intern, Office of General Counsel, Connect2Health^{FCC} Task Force May 2020—December 2020

- Crafted public notices and guidance documents during Congressional broadband mapping update
- Developed interagency demonstration project to revitalize broadband connectivity subsidy program
- Advised Deputy General Counsel on healthcare and telecommunications policy and legal issues

Barnes and Noble Booksellers St. Peters, Missouri
Bookseller June 2017—August 2019

VOLUNTEER SERVICE & COMMUNITY INVOLVEMENT

The District Church Fall 2020–Present
Small Group Leader

Lindenwood University Football Fall 2014–Fall 2018

- Engaged with elementary school students through in-school reading, mentorship programs, camps

INTERESTS – Travel, baseball & soccer, movies, American history non-fiction and biographies

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Page: 1

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LAW 6212	Civil Procedure Berman	4.00	A-
LAW 6216	Fundamentals Of Lawyering I Desanctis	3.00	A
Ehrs 15.00 GPA-Hrs 15.00 GPA 3.822			
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LAW 6214	Constitutional Law I Cheh	3.00	CR
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CUM 31.00 GPA-Hrs 15.00 GPA 3.822			
Good Standing			
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SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2020			
Law School			
Law			
LAW 6380	Constitutional Law II Bracey	3.00	A-
LAW 6397	Federal Indian Law Alexander	2.00	A-
LAW 6400	Administrative Law Siegel	3.00	B+
LAW 6410	Health Care Law Rosenbaum	4.00	A
LAW 6666	Research And Writing Fellow Gambert	2.00	CR
Ehrs 14.00 GPA-Hrs 12.00 GPA 3.694			
CUM 45.00 GPA-Hrs 27.00 GPA 3.765			
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LAW 6360	Criminal Procedure Saltzburg	4.00	A-
LAW 6617	Law And Medicine Suter	3.00	A
LAW 6666	Research And Writing Fellow Gambert	2.00	CR
LAW 6669	Judicial Lawyering Somers	2.00	A-
Ehrs 11.00 GPA-Hrs 9.00 GPA 3.778			
CUM 56.00 GPA-Hrs 36.00 GPA 3.769			
Good Standing			
Fall 2020			
Law School			
Law			
LAW 6657	Law Review Note	1.00	----------
	Credits In Progress:	1.00	
Spring 2021			
LAW 6657	Law Review Note	1.00	----------
LAW 6668	Field Placement	3.00	----------
	Credits In Progress:	4.00	
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WASHINGTON, DC

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GWid : G45403844
Date of Birth: 23-JUL

Date Issued: 06-JUN-2021

Record of: Brayden Jack Parker

Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2021			
LAW 6218	Prof Responsibility & Ethics	2.00	----------
LAW 6230	Evidence	4.00	----------
LAW 6387	Voting Rights	2.00	----------
LAW 6411	Health Care Law Seminar	2.00	----------
LAW 6591	Us Legal History	2.00	----------
LAW 6658	Law Review	1.00	----------
	Credits In Progress:	13.00	

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	56.00	36.00	135.67	3.769
OVERALL	56.00	36.00	135.67	3.769

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EXPLANATION OF COURSE NUMBERING SYSTEM

All colleges and schools beginning Fall 2010 semester:

1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
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6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
700s	The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School

Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and
School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN

The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit http://go.gwu.edu/corcorantranscriptkey

THE CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA

Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
		NVCC	Northern Virginia Community College
CU	Catholic University of America	PGCC	Prince George's Community College
GC	Gallaudet University	SEU	Southeastern University
GU	Georgetown University	TC	Trinity Washington University
GL	Georgetown Law Center	USU	Uniformed Services University of the Health Sciences
GMU	George Mason University		
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS

Undergraduate Grading System

A, Excellent; *B*, Good; *C*, Satisfactory; *D*, Low Pass; *F*, Fail; *I*, Incomplete; *IPG*, In Progress; *W*, Authorized Withdrawal; *Z*, Unauthorized Withdrawal; *P*, Pass; *NP*, No Pass; *AU*, Audit. When a grade is assigned to a course that was originally assigned a grade of *I*, the *I* is replaced by the final grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.

Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.

Effective Fall 2003: The grading symbol R indicates need to repeat course.

Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of *I*, the grade is replaced with *I* and the grade.

Effective Fall 1987: The following grading symbols were added: *A-, B+, B-, C+, C-, D+, D-*.

Effective Summer 1980: The grading symbols: *P*, Pass, and *NP*, No Pass, replace *CR*, Credit, and *NC*, No Credit.

Graduate Grading System

(Excludes Law and M.D. programs.) *A*, Excellent; *B*, Good; *C*, Minimum Pass; *F*, Failure; *I*, Incomplete; *IPG*, In Progress; *CR*, Credit; *W*, Authorized Withdrawal; *Z*, Unauthorized Withdrawal; *AU*, Audit. When a grade is assigned to a course that was originally assigned a grade of *I*, the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.

Effective Fall 1994: The following grading symbols were added: *A-, B+, B-, C+, C-* grades on the graduate level.

Law Grading System

A+, A, A-, Excellent; *B+, B, B-*, Good; *C+, C, C-*, Passing; *D*, Minimum Pass; *F*, Failure; *CR*, Credit; *NC*, No Credit; *I*, Incomplete. When a grade is assigned to a course that was originally assigned a grade of *I*, the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.

M.D. Program Grading System

H, Honors; *HP*, High Pass; *P*, Pass; *F*, Failure; *IP*, In Progress; *I*, Incomplete; *CN*, Conditional; *W*, Withdrawal; *X*, Exempt, *CN/P*, Conditional converted to Pass; *CN/F*, Conditional converted to Failure. Through Summer 2014 the *I* was replaced with *I* and the final grade.

For historical information not included in the transcript key, please visit http://www.gwu.edu/transcriptkey

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The George Washington University Law School
2000 H Street NW
Washington, DC 20052

June 13, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing with great enthusiasm and unqualified support for Brayden Parker as a clerk in your chambers. Brayden was one of 14 students in my Fundamentals of Lawyering class at GW Law School last year. The course is a year-long, six-credit class that combines research and writing instruction with other core professional development skills. I was the architect of the FL Program and formerly its Director; I have since retired from the law faculty after eighteen years.

Brayden was a top performer in my class both semesters. He has excellent written and oral communication skills, as his transcript and his experiences as a Dean's Fellow and Editor on Law Review make clear. He is generous, kind and courteous, not just to professors but to his peers. In fact, I regularly had other students tell me that Brayden is their "favorite person in law school," willing to help anyone with anything. "He would give you the shirt off his back" is another phrase I have heard used repeatedly to describe him. In his role as Dean's Fellow, he gave his 1L students his all this year while teaching them research, writing, and citation (over Zoom no less).

I have gotten to know Brayden quite well over the past year since our class ended and want to underscore how much value he would add to chambers personally. In part because COVID disrupted so many students' summer jobs last year, I started a book club at their request. We've been meeting several times a month for over a year now, and both Brayden and his wife Maggie are regular book club participants. Although he claimed not to have been a fiction reader, Brayden recommends excellent books and comes prepared to discuss them at the highest level, one which is easily comparable to my fellow classmates from English graduate school. He adds depth to the discussions and has contributed to the genuinely positive, "feel-good" vibes of our group's semi-monthly virtual meetings.

I am pulling for Brayden perhaps more than any of the tens of dozens of students for whom I have written clerkship letters this year and in the past because I know how much he would love it. He would be a perfect fit, and you would be lucky to have him.

Very sincerely,

Christy H. DeSanctis
cdesanctis@me.com
202.285.6690

The George Washington University Law School
2000 H Street NW
Washington, DC 20011

June 13, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing in strong support of Brayden Parker, who is seeking a clerkship with you to begin in 2022. Brayden was a student in my Torts class his first semester of law school, and he is currently a student in my Law and Medicine class. Based on my knowledge of him as a student and person, I highly recommend him as a law clerk.

Although Brayden does not frequently volunteer in class, he has always been very well prepared and thoughtful in his responses when I've called on him in both Torts and Law and Medicine. The first time I called on him in Torts, I was struck by how well he did. His responses demonstrated that he had read carefully, with thoughtful attention to detail. Not only did he have a strong understanding of the material, but he shone in his ability to think on his feet and to apply the doctrine to hypotheticals I posed. He responded with the quiet confidence of someone who is not intimidated by being pushed to do legal analysis and think through new concepts on the spot. Brayden demonstrated the same ability and confidence when I called on him again in Law and Medicine.

Based on Brayden's performance in Torts, I expected him to do well on the final examination. And indeed he did. His overall score for the exam was the seventh highest in the class, with a score that was 1.06 standard deviations above the mean. Brayden's essays in response to the two issue-spotting questions were particularly strong, with scores that were 1.56 and 2.02 standard deviations above the mean. In fact, the quality of his essays relative to most others was stood out enough that I wrote a note to myself that the essays should earn high points based on the strong writing and analysis (I only add up the scores at the very end of grading). The other portion of the exam included multiple-choice questions, which required careful reading and analysis. Brayden's score for that portion was 0.36 standard deviations above the mean. In short, he demonstrated the same abilities in his exam that he demonstrated in class – strong knowledge of the material and the ability to use the doctrine to think analytically and carefully about a legal problem. These skills have undoubtedly played a role in his strong academic performance in his other classes since he has been in law school.

In the last year, I have gotten to know Brayden fairly well based on conversations outside of class. Early in his first semester of law school, he and a few other Torts students invited me to join them at a café after class. He and I also had some in-depth conversations last year about his career and interest in health law when he was applying for summer internships. Brayden was very much at ease in these settings. He also showed a subtle, wry sense of humor and was far less reserved than I thought he might be based on his demeanor in class.

From all that I have seen, Brayden is a very bright, thoughtful, highly motivated, and mature student who writes well and has strong analytic capabilities – all traits one would want in a law clerk. I am sure that these qualities played a significant role in his selection as a Deans Fellow when he was only a 2L and as Managing Editor for the George Washington University Law Review, a position that requires organization, maturity, and good judgment. In addition, Brayden has demonstrated intellectual curiosity in his selection of courses across an array of legal areas. Relatedly, he was not daunted by tackling a Law Review note topic that intrigued him (Native American healthcare and Federal Indian trust duty), even though it was an area about which he did not initially know a lot. Instead, he dove in and mastered the material well enough to write a note on this topic. All of these traits suggest that Brayden would be a fine law clerk who would thrive and do well in researching, analyzing, and providing accurate legal insights into a wide range of legal topics, as is required for a clerkship.

For all of these reasons, I strongly recommend Brayden for a clerkship. Not only does he have the qualities to be a fine law clerk, but he also would get a great deal out of a clerkship. He is completing a judicial externship in D.C. Superior Court, which he describes as "one of the highlights" of his week. He also understands the wonderful opportunities clerkships provide to refine various lawyering skills through research and writing, observing attorneys in action, and the kind of mentoring that comes from working closely with a judge. With Brayden's work ethic, discipline, quiet confidence, and intelligence, I am certain a judge could depend on him to offer the strong intellectual support needed from law clerks. In addition, I know Brayden would easily get along

Sonia Suter - ssuter@law.gwu.edu

with everyone in chambers, including support staff, co-clerks, and a judge. He is easy to talk to one on one, listens well, and offers thoughtful contributions. The fact his peers chose him to be the Managing Editor of the Law Review suggests he can work well with peers and is highly respected by them.

If you have any other questions about Brayden's application and abilities, I would be happy to speak with you. Please feel free to contact me at (202) 994-9257.

Sincerely,

Sonia M. Suter, J.D., M.S
Professor of Law and Kahan Family Research Professor of Law
Founding Director, Health Law Initiative

Brayden Parker – The George Washington University Law School
Legal Writing Sample

Writing Sample

NOTE: This writing sample was produced as a bench memorandum drafted for Judge Gerald I. Fisher of the Superior Court of the District of Columbia. The memorandum details a compassionate release petition and includes a comprehensive statement of the case, introduction of the legal standard, analysis of the facts, and recommendations. The memorandum was supplied to both the Judge and the Judge's law clerks for review. The writing sample is the original work of the applicant and has not been edited by anyone else.

Brayden Parker – The George Washington University Law School
Legal Writing Sample

TO: Judge Gerald I. Fisher

FROM: Brayden Parker, Legal Intern

RE: Bench Memorandum, *United States v. Down*

DATE: February 18, 2021

BENCH MEMORANDUM

This matter comes before the Court upon Defendant Andrew Down's Motion for Compassionate Release, docketed on November 30, 2020, which seeks relief pursuant to the COVID-19 Response Supplemental Emergency Amendment Act of 2020. Mot. at 1. The Government filed its Opposition on December 21, 2020, followed by the Defendant's Reply on December 29, 2020. Gov. Opp. at 1; Def's Reply Br. at 1.

Mr. Down argues that the Court should reduce his sentence to effectuate his early release from incarceration because his diagnoses of [redacted], early stage cancer, hypertension, hyperlipidemia, and history of stroke put him at risk of serious complications from COVID-19. Mot. at Ex. 1. Additionally, Mr. Down argues that he is rehabilitated and no longer a danger to others. Mr. Down contends that his completion of drug addiction programs, continued education, leadership experience, lack of any violence or drug-related disciplinary infractions, and low Bureau of Prisons (BOP) recidivism score, demonstrate his rehabilitation and that he no longer poses a threat to society. *Id.* at 2–3.

In response, the Government acknowledges that Mr. Down's early stage cancer increases the risk of contracting severe COVID-19, while his [redacted] diagnosis and hypertension *might* increase the risk of contracting severe COVID-19. Gov. Opp. at 5–7. Even still, the Government argues that Mr. Down remains a threat to society and has not been properly rehabilitated, as evidenced by the nature and circumstances of the present offense—the murder of an innocent cab driver—Mr. Down's recent increase in disciplinary infractions, Mr. Down's recent decrease in education and rehabilitation efforts, the Parole Commission's decision to deny parole, and Mr. Down's lack of maturity demonstrated by failing to accept responsibility and express remorse for the offense. *Id.* at 9–14.

Having reviewed the entire record herein and for the following reasons, this Court should find that Mr. Down has demonstrated he no longer poses a danger to the community and has

been sufficiently rehabilitated while incarcerated. Additionally, Mr. Down has proven that his plethora of medical conditions—[redacted], early stage cancer, hypertension, hyperlipidemia, and history of stroke—combined with the high risk of contracting COVID-19 at FCI Coleman constitute extraordinary and compelling reasons for release because they make him particularly prone to the deleterious effects of the virus.

I. BACKGROUND

Over twenty-seven years ago, Mr. Down pled guilty to voluntary manslaughter while armed, resulting in the death of Jerry Krane. Mot. at 4–5. Mr. Krane's murder took place during the first of three armed robberies Mr. Down committed over the course of a week in November 1990. *See id*. The records of the present offense are scarce, and the facts presented here are primarily adopted from the United States Parole Commission Prehearing Assessment and Summary. *See* Mot. at 4; Gov. Opp. at 2. On or around November 5, 1990, Mr. Down stopped a taxi cab driven by one Mr. Krane. Addicted to crack cocaine, Mr. Down planned to rob the driver for cash to fuel his drug addiction. When Mr. Down pulled out the three-inch knife he was carrying and threatened Mr. Krane, Mr. Krane resisted, swinging at Mr. Down and striking him in the jaw. Mr. Down retaliated by stabbing Mr. Krane several times. He then dragged Mr. Krane from the car and took cash from his pockets. Then, he drove off in the cab, leaving Mr. Krane by the roadside. *See* Mot. at 4. Mr. Krane died because of his wounds, although Mr. Down did not realize he had injured Mr. Krane so badly.

The following week Mr. Down committed two additional armed robberies of cab drivers. *Id.* at 3–4. These encounters occurred in Prince Georges County and Charles County, Maryland. *Id.* In both instances, Mr. Down stopped taxi cabs and struck the drivers in the head, one with a tire iron, the other with a socket wrench. Gov. Opp. at 13. He was arrested in Maryland on the armed robbery charges and was eventually convicted for both and sentenced to terms of seven years in Prince Georges County and thirty years in Charles County. Mot. at 4. The terms were to be served consecutively. *Id*. Following his Maryland convictions, Mr. Down was extradited to the District of Columbia and eventually pled guilty to the present offense in this Court. *Id.* at 4–5. On December 10, 1993, this Court sentenced Mr. Down to 10–30 years to be served following the two Maryland sentences. *Id.* at 4. Mr. Down did not file any appeals. Gov. Opp. at 2.

Following nearly eighteen years of incarceration, on March 26, 2008, the Maryland courts granted Mr. Down parole for both Maryland sentences. Mot. at Ex. 2. Mr. Down then began serving the D.C. sentence. Mot. at 4.

In 2014, Mr. Down became eligible for parole in the District of Columbia and the Parole Commission guidelines recommended him for parole. *Id.* at 2. The Parole Commission, however, denied Mr. Down's parole because of a "reasonable probability . . . [he] would not obey the law if released" and the release "would danger (*sic.*) the public safety." Gov. Opp. at Ex. 2. Despite a similar guideline recommendation for release, the Parole Commission again denied parole in October 2020. *Id*. Mr. Down is currently housed at FCI Coleman, a low security facility. Mot. at 2.

As of today, Mr. Down has served nearly thirteen years of his current D.C. term. *See* Gov. Opp. at Ex. 1. He is eligible for home confinement as of April 12, 2025; his projected parole date is October 12, 2025; his statutory release date is May 16, 2028; and his full term expires March 25, 2038. *Id.*

II. ANALYSIS

A. Danger to Community and Rehabilitation

In assessing whether Mr. Down is eligible for release, the Court must first determine if he is a threat to the community pursuant to the factors listed in 18 U.S.C. §§ 3142(g), 3553(a), and evidence of his rehabilitation. Under 18 U.S.C. § 3142(g), the Court must take into consideration: (1) the nature of the offense charged, including whether the offense is a crime of violence; (2) the weight of evidence against the Defendant; (3) the Defendant's history and characteristics[1]; and (4) the threat posed by the Defendant to the community.

Mr. Down argues that he does not pose a threat to society because he successfully addressed his drug addiction while incarcerated, he has never been cited for any violence or drug related offenses while incarcerated, and the BOP classifies him as a minimum risk for

[1] History and characteristics include: (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law[.] *See generally* 18 U.S.C. § 3142(g)(3).

recidivism. Mot. at 2. In contrast, the Government argues that Mr. Down still poses a danger to the community given the nature and circumstances of his crime and the contemporaneous armed robberies he committed in Maryland. Additionally, the Government notes Mr. Down's uptick in disciplinary incidents in the past eighteen months, his lack of education and rehabilitation in the past eighteen months, the Parole Commission's several decisions denying parole, and Mr. Down's failure to accept responsibility and express remorse for his crimes, as evidence of failed rehabilitation. Gov. Opp. at 9–14.

1. Nature and Circumstances of Offenses

In determining whether Mr. Down has demonstrated that he is sufficiently rehabilitated and would not be a danger to the community if released, the Court must consider the nature and seriousness of the offenses he committed. *See* 18 U.S.C. §§ 3142(g); 3553(a).

There is no question that the nature and circumstances of Mr. Down's crimes are extremely serious, as the present case resulted in the death of Mr. Jerry Krane. *See* Mot. at 4. As the Government has articulated, Mr. Down not only assaulted and robbed Mr. Krane, but left him to die in the middle of the street as Mr. Down drove away in Mr. Krane's taxi cab. *See* Gov. Opp. at 10. Mr. Down's conduct is even more troubling because this was not a one-time incident. *See id.* at 13. Rather, Mr. Down committed two similar violent offenses in Prince Georges County, Maryland and Charles County, Maryland within a week of the murder of Mr. Krane. *See id.* at 9–10. During the commission of these two crimes, two other taxi drivers were stopped and assaulted, one with a tire iron and the other with a socket wrench. *Id.*

At the time of the murder and armed robberies, Mr. Down was 25-years-old and suffered from an addiction to crack cocaine, and he purportedly committed the offenses to obtain funds to fuel that addiction. *See* Def's Reply Br. at 11. Additionally, Mr. Down had no history of criminal activity before this single week of brutal crime in November 1990. *See* Gov. Opp. at 9. While incarcerated, Mr. Down has successfully completed drug and violence prevention treatment programs. Def's Reply Br. at 14. And in his over thirty years of incarceration, Mr. Down has not committed any violent or drug-related offenses. *Id.* at 11–12. Finally, Mr. Down accepted responsibility for the present offense by pleading guilty to the charge in front of this Court. *See* Gov. Opp. at 14–15.

Taken together, the violent nature and circumstances of these offenses militate against release; however, their weight is diminished somewhat—but by no means entirely—by Mr. Down's drug addiction and relative youth[2] at the time of the commission of his crimes, his lack of prior criminal history, his successful completion of nearly thirty years in prison without any further violence or drug-related offenses, and the age of the charges. Thus, while this factor weighs strongly against Mr. Down's release, it is not, in this Court's view, the determinative element in the calculation of dangerousness.[3]

2. History and Characteristics of Defendant

The Court must also consider Mr. Down's history and characteristics. 18 U.S.C. §§ 3142(g); 3553(a). Mr. Down argues that he has successfully been rehabilitated as evidenced by completion of drug and violence treatment, an absence of any citations for drugs or violence, continued education, work experience, and the Parole Commission's guideline recommendations for parole. Mot. at 15. In response, the Government contends that Mr. Down has not been successfully rehabilitated because of an increase in disciplinary action, a decline in education and drug rehabilitation, and the Parole Commission's two recent decisions to deny parole. Gov. Opp. at 10–12.

As discussed above, Mr. Down committed these offenses while battling a crack cocaine addiction, and primarily to fuel that addiction. Def's Reply Br. at 11. Over the past thirty years, however, Mr. Down has demonstrated that he is no longer susceptible to the effects of cocaine or other illicit substances. In both the Maryland prison system and the BOP, Mr. Down successfully completed drug rehabilitation and substance abuse programs. *See id.* at 14. Not only did he complete the programs, but following graduation Mr. Down volunteered as a leader and facilitator of the programs. In his role as membership director, Mr. Down encouraged other participants to engage with group therapy discussions. *See* Mot. at 20. Likewise, in the Lifestyles rehabilitation program, Mr. Down created a health committee to shine a light on physical health

[2] It should be noted that the Omnibus Public Safety and Justice Amendment Act of 2020 also includes a provision that amends D.C. Code 24-403.03(b) by changing the eligibility for relief under the Incarceration Reduction Amendment Act of 2016 (IRAA) from under 18 years old at the time of the offense, to under 25 years old. Thus, Mr. Down, who was born September 10, 1965, is less than two months beyond the IRAA's age limit.

[3] Perhaps due to the passage of time, the Government was unable to locate members of Mr. Krane's family to obtain statements regarding the impact of the crime and their views as to Mr. Down's release. *See* Gov. Opp. at 13.

issues amongst the prison population. *See id.* at 18. It appears that Mr. Down has successfully responded to drug rehabilitation and has demonstrated a commitment to remain drug free. Over the past thirty years, Mr. Down has not been cited for any drug possession or drug use disciplinary violations. *See* Def's Reply Br. at 11–12.

The Government responds that Mr. Down has not "taken full advantage of available programming for behavioral change" while in prison. Gov. Opp. at 11. However, Mr. Down has indeed continued drug rehabilitation, including a December 2020 Drug Abuse Education Course. Def's Reply Br. at Ex. 1. Mr. Down also currently participates in Narcotics Anonymous. Def's Reply Br. at 3. Thus, Mr. Down has not only completed earlier courses addressing the drug problems underlying his present offense, but continues to engage in the rehabilitation process.

Mr. Down's behavior over the past thirty years also demonstrates that he is no longer prone to violence. While incarcerated in Maryland, Mr. Down completed "Alternative to Violence" workshops for which he received commendation. *See* Mot. at 20. According to Dennis G. Shaw, one of the volunteer facilitators of the program, Mr. Down was "an outstanding participant" in the program who "not only learn[ed] himself, but help[ed] others . . . come to terms with the violence within themselves." Mot. at Ex. 8. Clearly, Mr. Down left a lasting impact on the program facilitators. Further, while in the BOP system, Mr. Down completed additional educational programing to combat violence, including "Positive Psychology" and "Life Skills." Mot. at Ex. 12.

Like the drug rehabilitation programs, it appears that these violence treatment classes have worked, because Mr. Down has not been cited for any violence or weapons-related disciplinary violations while in the BOP system. *See* Def's Reply Br. at 7. In fact, Mr. Down has not been cited for any Level 100 violations—the most severe offenses—and has only been cited for six Level 200 and Level 300 violations, specifically: refusing to obey an order (2014), being in an unauthorized area (2015), lying or falsifying statement (2015), refusing to obey an order (2016), threatening bodily harm (2017), and disruptive conduct (2019). *See* Mot. at 17. The Government relies heavily on the latter two offenses as evidence of Mr. Down's failure to avoid violence. *See* Gov. Opp. at 10. But closer inspection of these offenses reveals that they do not amount to the violent inclination that the Government alleges.

First, the Government cites the 2017 citation for threatening bodily harm. *See id.* at 10. This citation arose from a confrontation between Mr. Down and another inmate, where the

inmate allegedly shoved Mr. Down and Mr. Down responded by threatening the inmate because he could not "allow people to violate" him. Mot. at Ex. 7. Though Mr. Down's threat is troubling, the incident was merely words, not actions on his part. As a BOP Lieutenant testified following the event, "Mr. Down said something but [I] don't believe that he actually meant it; just spoke it out of his mouth." *Id.* Further, Mr. Down expressed an understanding of the impact of his words. During a 2020 parole prehearing evaluation, Mr. Down acknowledged that he would have been "concerned too if he was the [parole] Examiner" presented with this violation. Gov. Opp. at Ex. 2, at 7.

Second, the Government references the 2019 violation for disruptive conduct. *See* Gov. Opp. at 10. This arose from an interaction between Mr. Down and a pharmacy technician. According to the technician's report, Mr. Down was frustrated with pharmacy staff because one of his prescriptions had not been refilled. Mr. Down allegedly told the technician "I will be back later and you are not going to like it." *Id.* at Ex. 3. Mr. Down contends that he did not mean *physical* violence but that the technician "would not like it when I push paper on them" during subsequent return trips to the pharmacy. *Id.* Although the more likely interpretation of what Mr. Down said implies the threat of bodily harm, his words did not manifest as action. Even still, Mr. Down acknowledged regret for this violation by admitting he learned a lesson when disciplined. Likewise, he expressed understanding that his words had the potential to be interpreted as threatening. *See* Gov. Opp. at Ex. 2, at 6. While not spotless, Mr. Down's disciplinary record is void of any violent offenses that would cause the Court concern, or negate his thirty-year lack of violence.

Mr. Down has also used the past thirty years to prepare for life after incarceration. While in Maryland, Mr. Down obtained his GED. Mot. at 18. Subsequently, he served as head science and social studies tutor for the GED program, for which he received commendation. *See id.* at Ex. 10. Since arriving in the BOP system, Mr. Down has continued his education, completing over 600 hours in computer programming courses and over 120 hours in "Life Skills" coursework. Mot. at Ex. 12. The Government contends that Mr. Down's record insufficiently demonstrates readiness for reentry because in recent years he has completed less coursework—no classes in 2019, six in 2018, one in 2017, and two in 2016. *See* Gov. Opp. at 3, 11. Mr. Down responds that the Inmate Education Data form is incomplete and fails to show his recently completed Criminal Thinking Course and Drug Abuse Education Course. *See* Def's Reply Br. at

8–9. In any event, reliance on the most recent education record ignores Mr. Down's consistent efforts over the past three decades to further his education. Moreover, the recent record fails to reflect his work experience, which similarly prepares inmates for life after release.

Over the past three decades, Mr. Down has maintained many jobs, for which he received praise from supervisors and monetary bonuses, that prepared him for post-release employment. *See* Mot. at Ex. 11. In Maryland, he worked in a UNICOR-like trade program learning upholstery and tile setting. Similarly, Mr. Down obtained OSHA certifications for forklift operation, and completed coursework to receive his commercial driver's license. Mot. at 19. Mr. Down's significant leadership experience also reflects his ability to reintegrate into society. As previously mentioned, Mr. Down facilitated a drug rehabilitation program as membership director. *Id.* at 20. Further, he led education workshops and organized Walk-a-Thons. *Id.* at 18. Lastly, Mr. Down writes poetry to cope and self-facilitate rehabilitation. Multiple online outlets have published Mr. Down's poetry and he encourages other inmates to use writing to address their own rehabilitation. *See id.* at 19. In sum, Mr. Down's education, work, and leadership experience are strong evidence of his successful rehabilitation and ability to reenter society.

Finally, most of the information contained in the records of the BOP and the Parole Commission favors the conclusion that Mr. Down has been successfully rehabilitated, even though the Commission has twice denied him parole. Currently, the BOP PATTERN Score classifies Mr. Down as a minimum risk of recidivism, the lowest possible score. *Id.* at 16. As a consequence, Mr. Down is currently housed in a minimum-security facility at FCI Coleman. Def's Reply Br. at 7. The Government responds by agreeing with the Parole Commission's denials of parole because of its fear that Mr. Down has not been rehabilitated and requires "additional programing to remain crime-free in the community." Gov. Opp. at 11. The Government places great weight on the Commission's rationale for the latest denial in October 2020. *See id.* The Parole Commission's recent decision, however, was prefaced on the 2019 disciplinary violation for disruptive conduct and the failure to complete the Residential Drug Abuse Program (RDAP). *See id.* at Ex. 2. As noted above, the 2019 incident did not result in harmful or violent conduct, and in December 2020 Mr. Down completed the RDAP curriculum that the Parole Commission desired. On balance, the Parole Commission's, and the Government's, concerns appear to be satisfied. Furthermore, the several denials of parole have occurred despite the Commission's guidelines favoring Mr. Down for parole. *See* Def's Reply

Br. at 3, 13. Combined with prior satisfaction of the Maryland parole requirements, *see* Mot. at 4, the BOP PATTERN Score and the Parole Commission's guideline recommendations further evidence Mr. Down's successful rehabilitation.

On balance, Mr. Down's history and characteristics weigh decidedly in favor of his release. Despite the Government's valid concern about the two recent citations and recent denial of parole, in aggregate, Mr. Down's record of substance abuse treatment, violence treatment, continued education, work, and leadership experience, and the BOP and Parole Commission's recommendations, all show that Mr. Down has been successfully rehabilitated and can satisfactorily reenter society.

3. Need for the Sentence Imposed

In deciding Mr. Down's motion, the Court must consider the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense. 18 U.S.C. § 3553(a). This Court is satisfied that Mr. Down's initial sentence of 10–30 years, to be served following his incarceration in Maryland, which ended up being nearly eighteen years, was just and appropriately reflected the seriousness of voluntary manslaughter while armed.

He has now spent almost thirteen years serving his D.C. sentence, which is three years above the minimum term that was imposed. He will be reconsidered for parole in November 2021, and his current anticipated parole date is November 2025. The question becomes whether additional incarceration is necessary now given that Mr. Down has spent the last thirty years in prison and done so without serious offense and no violence, weapons, or drug-related charges. Put in the language of the Emergency Act, does the amount of time Mr. Down has already served provide adequate public and individual deterrence for these types of serious crimes, in addition to deterring individuals released on parole for serious crime from violating the conditions of their parole? *See* 18 U.S.C. § 3553(a). And relatedly, is Mr. Down's continued incarceration necessary to protect the public from further crimes he may commit if released? *See* 18 U.S.C. § 3553(a).

For the previously discussed reasons, Mr. Down has rehabilitated himself and remediated the underlying issues of drug abuse and violent proclivities such that the thirteen years he has served for voluntary manslaughter while armed is sufficient to satisfy the purposes of sentencing.

Furthermore, this Court should be encouraged by Mr. Down's reentry plan and believe it will aid in his ability to avoid further offense. At present, Mr. Down plans to temporarily live in

Washington, D.C. in the District's PEP-V program. This transition program will provide Mr. Down with rent-free housing, on-site health services, mental health services, financial counselors, and assistance in securing long-term housing. *See* Mot. at 20–21. The Public Defender Service's Office of Rehabilitation and Development will also provide additional resources during reentry. Def's Reply Br. at 15. Moreover, Mr. Down has some personal savings from work completed while in prison, and his family has also committed to provide assistance. *Id.* Following successful reentry in the District, Mr. Down plans to relocate to Havana, Florida—a small suburb of Tallahassee—to take care of his elderly mother. Mr. Down, however, plans to delay this transition until after the present pandemic so to protect his mother's health and safety. *See id.* at 14–15.

Supported by the District's reentry programs and bound by conditions if released, Mr. Down has sufficient incentives to not reoffend. Therefore, because of the length of the sentence served, Mr. Down's successful rehabilitation, and the reentry plan, the need for the sentence imposed requirements have been satisfied. Because this Court would merely be altering Mr. Down's sentence to suspend all but the time he has served, the prospect of probation revocation should serve as a sufficient disincentive to further criminal or other antisocial conduct on his part.

B. Eligibility Under the Emergency Act

D.C. Code § 24-403.04(a)(3)(A) states in relevant part that the Court may release a defendant for "extraordinary and compelling reasons . . . including . . . [a] debilitating medical condition involving an incurable, progressive illness, or a debilitating injury from which the defendant will not recover." But the list in (a)(3)(A) is not exclusive.

Mr. Down argues that he is eligible for compassionate release under the Emergency Act because of five diagnosed conditions: [redacted], early stage cancer, hypertension, hyperlipidemia, and history of stroke. Mot. at Ex. 1. The Government does not seriously contest Mr. Down's five diagnosed conditions. *See* Gov. Opp. at 5. The Government's primary response is that Mr. Down's conditions are not extraordinary or compelling because they are effectively managed by the medical staff at FCI Coleman. *See id.* at 7–8. Ultimately, these conditions, some separately, and all jointly, are severe enough to come within the meaning of "extraordinary and compelling reasons" for his release. Each will be addressed in turn.

First, Mr. Down was recently diagnosed with early stage cancer. Mot. at 11. The cancer is described as "[redacted] *Id.* at. Ex. 1. After discovering [redacted], a BOP oncologist recommended removal. At present, Mr. Down has not been able to receive that surgery. *See id.* According to the CDC, cancer is one of many factors that place an individual at an increased risk of severe illness from COVID-19. The Government does not contest this determination. *See* Gov. Opp. at 6–7.

Mr. Down also suffers from two additional complications that may increase his risk of severe illness from COVID-19, according to the CDC. Most dramatically, Mr. Down suffers from [redacted], an affliction with which he was first diagnosed in 1991. Mot. at Ex. 1. [redacted] Falling below this number places Mr. Down at an "acutely serious risk of death or serious injury to COVID-19." *Id.* The CDC lists an immunocompromised state from [redacted] as a condition that may increase risk of severe illness from the coronavirus. Again, the Government does not contest this determination. *See* Gov. Opp. at 6–7. Mr. Down also has suffered from hypertension—elevated blood pressure—since at least 2009. Mot. at 9. Hypertension is another risk factor identified by the CDC that the Government acknowledges afflicts Mr. Down. *See* Gov. Opp. at 6–7.

Additionally, Mr. Down suffers from hyperlipidemia—elevated cholesterol—and a history of stroke and epileptic seizures. Mot. at 9–11. The Government correctly points out that neither hyperlipidemia, nor stroke or seizure, are conditions identified by the CDC as posing an additional risk of severe illness from COVID-19.[4] *See* Gov. Opp. at 7. The CDC list itself, however, is not exhaustive, nor determinative in the Emergency Act calculus. Mr. Down has provided evidence that according to the New York State health service, hyperlipidemia is the third highest comorbidity among COVID-19 deaths in that state. *See* Def's Reply Br. at 6. Similarly, several academic studies cited by Mr. Down show a relationship between stroke history and increased risk of COVID-19. *See* Mot. at 9–10.

[4] The Government also contests the validity of Mr. Down's claims of stroke, stating that the medical history is inconclusive. *See* Gov. Opp. at 7. However, a 2010 BOP medical report includes an MRI of Mr. Down that is "consistent with an old stroke." *Id.* Nevertheless, the Court not need decide the validity of the stroke diagnosis to determine Mr. Down's eligibility under the Emergency Act. The [redacted], cancer, and hypertension are sufficient.

In analyzing these conditions under the Emergency Act framework, Mr. Down's [redacted] diagnosis and related immunodeficiency itself is a "debilitating medical condition." D.C. Code § 24-403.04(a)(3)(A). A Judge of this Court has granted compassionate release to a similarly situated [redacted] defendant under the Emergency Act's "debilitating medical condition" prong. *See United States v. Dunn*, Case No. 1999-FEL-1751 (Brandt, J.) (D.C. Super. Ct. June 16, 2020) (holding defendant's [redacted] diagnoses are severe enough to trigger § (a)(3)(A)). This Court also held that [redacted] is an "extraordinary and compelling" reason to grant early release. *See United States v. Mabry*, Case No. 1993-FEL-2761 (Kravitz, J.) (D.C. Super. Ct. July 30, 2020) (holding defendant's [redacted] & hypertension are compelling and extraordinary reasons under Emergency Act); *United States v. Rider*, Case No. 1993-FEL-142 (Beck, J.) (D.C. Super. Ct. Aug. 26, 2020) (holding defendant's [redacted], [redacted], and hypertension, are compelling and extraordinary reasons). Certainly, the specter of combating the coronavirus with [redacted] is nothing short of "extraordinary and compelling."

Other judges have recognized that § (a)(3) is not exclusive, and there might be other extraordinary and compelling reasons to grant relief. *United States v. Bartrum*, Case No. 1990-FEL-2059 (Edelman, J.) (D.C. Super. Ct. June 16, 2020). The effects of a suppressed immune system precipitated by [redacted], compounded by recently-diagnosed cancer, high blood pressure, high cholesterol, and a history of stroke, collectively place Mr. Down at a heightened risk of severe illness from COVID-19, and constitute an "extraordinary and compelling reason" to grant release within the meaning of § 24-403.04(a)(3). Having already concluded that Mr. Down has sufficiently rehabilitated himself and will not present a danger to others if released, the grant of Compassionate Release pursuant to the Emergency Act is appropriate in this case.

III. CONCLUSION

Mr. Down now asks this Court to release him due to his vulnerability to serious illness or death if he contracts COVID-19. This Court should find that Mr. Down has demonstrated that he no longer poses a danger to the community and has sufficiently rehabilitated himself, and that his health circumstances constitute extraordinary and compelling reasons for immediate compassionate release under the Emergency Act. Accordingly, Mr. Down's Motion for Compassionate Release should be granted.

Applicant Details

First Name	**Cherylann**
Last Name	**Pasha**
Citizenship Status	**U. S. Citizen**
Email Address	**pashach@bc.edu**
Address	**Address** Street **101 S. Main Street, Apt 308** City **Memphis** State/Territory **Tennessee** Zip **38103** Country **United States**
Contact Phone Number	**4156866232**

Applicant Education

BA/BS From	**College of the Holy Cross**
Date of BA/BS	**May 2014**
JD/LLB From	**Boston College Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=12201&yr=2011**
Date of JD/LLB	**May 28, 2021**
Class Rank	**15%**
Law Review/ Journal	**Yes**
Journal(s)	**Boston College Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**Massachusetts**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Cohen, Jeffrey
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Bloom, Robert
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Berry, Jessica
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References

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Professor Jeffrey Cohen
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Professor Jessica Berry
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Judge Paul Haakenson
Email: phaakenson@comcast.net
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

CHERYLANN PASHA
Permanent: 19 Westgate Drive, San Rafael, CA 94903 • pashach@bc.edu • 415-686-6232

August 26, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am a rising third-year law student at Boston College Law School and am writing to apply for a clerkship in your chambers. I lived in Virginia for two years and would be delighted to move back.

After graduating *cum laude* from The College of the Holy Cross, I earned my Master's Degree in English at Georgetown, where I developed excellent research and writing skills. Through my experience on the *Boston College Law Review*, in my legal writing class, and in my various internships, I learned to apply those skills to legal writing. This past summer, I worked as a judicial extern for Judge Donato of the U.S. District Court for the Northern District of California. In this role, I researched complex procedural and substantive issues, which improved my legal writing in both quality and efficiency. I had the opportunity to work on a number of cases in diverse areas of the law, including intellectual property, antitrust, immigration, and criminal.

During the last academic year, I was a student attorney in the Juvenile Rights Advocacy Program. In this role, I had the opportunity to dive into administrative law while writing a complaint against the Department of Children and Families. I also had the chance to engage in formal and informal oral advocacy, arguing in school hearings and in Superior Court. This coming academic year, I am working with the Ninth Circuit Appellate Project, where I, as a member of team of three students, will have the chance to brief and argue an immigration appeal in front of the Ninth Circuit Court of Appeals.

My previous experience and strong research and writing skills make me well-prepared for a clerkship in your chambers. I would greatly appreciate the opportunity to discuss my interests and qualifications with you in further detail. I have attached my résumé, law school transcript, and a writing sample for your review. In addition, three letters of recommendation are forthcoming. Please feel free to contact me by phone or email if you would like any further information. Thank you for your time and consideration.

Respectfully,

Cherylann Pasha

Enclosures

CHERYLANN PASHA

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EDUCATION

BOSTON COLLEGE LAW SCHOOL Newton, MA
Candidate for Juris Doctor May 2021
GPA: 3.636/4.000 (Top 15%)
Publications: Cherylann Pasha, Note, *A Waiver of the Trial Itself: The Constitutional Threats of Extending* United States v. Mezzanatto *and Contractual Solutions*, B.C.L. REV. (forthcoming 2020)
Honors: *Boston College Law Review* (Articles Editor 2020-21; Staff Writer 2019-20); Negotiation Competition, Quarterfinalist
Activities: Grimes Moot Court Competition; Criminal Law Society, Co-President

GEORGETOWN UNIVERSITY Washington, DC
Master of Arts in English May 2016
GPA: 3.73/4.00

COLLEGE OF THE HOLY CROSS Worcester, MA
Bachelor of Arts, *cum laude*, *Major in English, Creative Writing Concentration* May 2014
GPA: 3.69/4.00
Honors: Dean's List (5/8 semesters); Sigma Tau Delta, President; English Honors Program
Study Abroad: University of St. Andrews, Scotland August 2012 – May 2013

JUDICIAL EXTERNSHIPS

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA San Francisco, CA
Judicial Extern for the Honorable James Donato June 2019 – August 2019
- Researched legal issues concerning magistrate judge jurisdiction, federal plea agreements, and the First Amendment
- Drafted bench memoranda for upcoming cases

MARIN SUPERIOR COURT San Rafael, CA
Judicial Extern for the Honorable Paul Haakenson June 2018 – August 2018
- Conducted research regarding prisoner rights and heritage trees; processed default judgement requests

ADDITIONAL EXPERIENCE

NINTH CIRCUIT APPELLATE PROJECT, BOSTON COLLEGE LAW SCHOOL Newton, MA
Student Attorney August 2020 – May 2021

CONTRA COSTA COUNTY DISTRICT ATTORNEY Martinez, CA
Summer Law Clerk May 2020 – August 2020
- Wrote memoranda on pressing issues facing the court, especially those relating to the COVID-19 pandemic
- Wrote and argued motions in Contra Costa Superior Court

JUVENILE RIGHTS ADVOCACY PROGRAM, BOSTON COLLEGE LAW SCHOOL Newton, MA
Student Attorney August 2019 – May 2020
- Argued a motion in Middlesex Superior Court; drafted and filed a complaint in Suffolk Superior Court
- Advocated for a high school student in suspension and expulsion hearings

GEORGETOWN UNIVERSITY PRESS Washington, DC
Marketing Coordinator August 2016 – June 2018
- Wrote all marketing copy, including web, catalog, and back-cover; managed all direct mail efforts

DC RAPE CRISIS CENTER Washington, DC
Hotline Advocate June 2017 – June 2018

INTERESTS: Ballet; yoga; live music; 19th century American literature; creative writing

Cherylann Pasha
Boston College Law School
Cumulative GPA: 3.636

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Robert Bloom	A	4	
Contracts	Sean O'Connor	A	4	
Torts	Judy McMorrow	A-	4	
Law Practice I	Jeffrey Cohen	A	3	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law	Kent Greenfield	B+	4	
Law Practice II	Jeffrey Cohen	A	2	
Criminal Law	Kari Hong	B+	4	
Intro to the Criminal Justice System	Robert Bloom & Stuart Hurowitz	A	3	
Property	Joseph Liu	B	4	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Law Review	John Gordon	P	2	
Juvenile Rights Advocacy Program	Jessica Berry	A-	5	
Professional Responsibility	Brandon White	B	2	
Evidence	Michael Cassidy	A-	4	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Law Review	John Gordon	P	2	
Juvenile Rights Advocacy Program II	Jessica Berry	P	3	
Trusts and Estates	Mark Glover	P	4	
Criminal Procedure	Robert Bloom	P	3	
Trial Practice	Judge Paul Chernoff and Judge Edward Ginsburg	P	2	

August 26, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Clerkship Candidacy of Cherylann Pasha

Dear Judge Hanes:

Specifically, with respect to her writing, Cherylann showed real sophistication in terms of organization, analysis, and style. She understands the need to walk the reader logically through complex legal doctrines and expressly show how the law applies to her set of facts. Her analytical skills are also top-notch and reflect a creative thinker. She made several thoughtful and nuanced arguments in her latest writing assignment that demonstrate a real depth of her understanding of the case law and the art of legal argument. Moreover, her writing style is incredibly good. She uses clear, crisp sentences that are easy to read, and he takes care with precision—ever important in the law.

Cherylann is a leader of her class here at Boston College. Cherylann has made the most of her time at Boston College Law School, immersing herself in a variety of activities. She competed in the school-wide moot court competition this semester. She is also currently one of only four students invited into the 9th Circuit Clinic. During her 2L year, she honed her litigation skills at the co-President of the Criminal Law Society and in the Juvenile Rights Advocacy Program. She is a member of the Law Review. Cherylann makes the most of her opportunities here at BC and others respect her keen intellect and witty sense of humor.

I hope I have conveyed to you that Cherylann Pasha would make a brilliant law clerk. She is an amazing student and I hold her in the highest regard. I enthusiastically recommend her. If you have additional questions, please do not hesitate to contact me.

Sincerely,

Jeffrey M. Cohen
Assistant Professor
Boston College Law School

August 26, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Clerkship Candidacy of Cherylann Pasha

Dear Judge Hanes:

It is with great pleasure that I recommend the above applicant for a clerkship. I have been fortunate to have had Cherylann in three of my classes: Civil Procedure during the fall of 2018, Introduction to Criminal Justice in the spring of 2019, and she is currently my student in Criminal Procedure. We have also had numerous conversations together about many lawyering topics. Thus, I feel uniquely qualified to write this recommendation.

In my first-year Civil Procedure class, Cherylann immediately stood out by her class participation. She became my go-to person on many of my most difficult questions. Her maturity, preparedness, insights, and questions contributed greatly to the collective wisdom of the class. It was not surprising that she wrote the third best exam in the class. In preparing this letter, I have reread her exam, and she writes superbly. She is very well organized, and has a clear and concise writing style. She gets to the point quickly. She demonstrated a thorough grasp of the subject matter. I have no doubt that she has superb analytical ability. My opinion is shared by my colleagues. (I should point out that she has not yet taken the Criminal Procedure exam.)

Cherylann was also a student in my first-year elective course, Introduction to Practice in the Criminal Justice System. In this experiential learning class (in which students do a variety of exercises including: bail argument, drafting and arguing a motion to suppress, and plea bargaining), Cherylann excelled. Her performance in all these tasks was superb. She was well prepared, and argued respectfully and convincingly. She was a very effective advocate. However the most impressive part of her performance was her insight paper, which was done after each exercise. She consistently demonstrated great thoughtfulness and constant introspective in how she could improve her performance. The experiential nature of the course gave me a chance to see Cherylann put her passion into practice. I especially appreciated her willingness to take a prosecutor's perspective, which she presented in an effective, non-dogmatic way.

Currently, Cherylann is a student in my Criminal Procedure class. Despite the large class size, Cherylann has again managed to stand out for her exceptional critical thinking ability. Her grasp of challenging class material is evidenced by her frequent, high-quality participation.

She is a very easy person to like. She has great self-esteem, maturity, and is comfortable in any situation. She has many friends who seem to admire and respect her. Despite her considerable academic and personality gifts, she has great humility. She has managed to excel despite some serious personal issues.

This Jesuit law school prides itself in encouraging students to use their education in the service of others. Cherylann has certainly had her share of Jesuit education. Let me share with you her commitment in her own words: "I came to law school because I want to advocate for survivors of domestic and sexual violence. I volunteered with the DC Area Rape Crisis Center for a year, working as a hotline advocate, sixteen hours per month. This experience gave me a significant amount of exposure to survivors of sexual assault and domestic violence. I was disappointed to hear how little faith each caller had in our court system's ability to provide justice. During each call, I provided crisis intervention support. My role on each call was different. Some callers required a safety plan; others had never told anyone they knew about their experience, and needed an outlet. Some calls even resulted in suicide intervention. It was my experience on the hotline that ultimately made me decide that I wanted to become an attorney."

Given the importance of clerk letters, I only write recommendations for people I believe will be a credit to this law school and themselves. There is absolutely no doubt that Cherylann will make an outstanding clerk. She is really smart and has a wonderful personality. It is a great pleasure to write this for her. She has the intelligence, analytical skills, organizational ability, insight, personality, and work habits to make an outstanding clerk. If I can be of further assistance feel free to call (617) 552-4374 or email me at bloom@bc.edu.

Sincerely,

Robert M. Bloom
Professor
Professor of Law and Dean's Distinguished Scholar

August 26, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Clerkship Candidacy of Cherylann Pasha

Dear Judge Hanes:

I am writing today to enthusiastically recommend Cherylann Pasha for a clerkship in your chambers. I have served the last three years as a supervising attorney in the Juvenile Rights Advocacy Program (JRAP) at Boston College Law School while maintaining my role as deputy director of the Children's Law Center of Massachusetts (CLCM). As an attorney and then deputy director at CLCM as well as in my role as a supervising attorney in JRAP, I have supervised and trained both law students and new attorneys for the last ten years. Ms. Pasha, who I supervised in JRAP for all of the 2019-2020 school year, is among the most analytical, dedicated, and capable of all the people I have supervised.

As a law student in JRAP, Ms. Pasha was assigned to her two cases for which she had primary responsibility. She also participated in a weekly seminar and a weekly supervision meeting to learn the skills and substantive law necessary to effectively handle JRAP cases. Ms. Pasha's role as student attorney required her to interview and maintain communication with clients and other professionals involved in the child's life; develop theories of the case and case plans; manage deadlines; conduct legal research, including on novel issues of law; negotiate with opposing counsel; argue a motion to dismiss in the state trial court; and write legal memoranda, correspondence with opposing parties, and a complaint in state court. In all of these areas, Ms. Pasha has excelled.

Ms. Pasha entered JRAP in the fall of 2019 and immediately engaged in the work necessary to learn the details of her two cases, both of which involved complex factual and procedural histories. In one matter, she represented a grandmother of a child in the custody of the state child welfare agency who sought to overturn a supported neglect allegation against her and gain visitation or custody of her grandchild. In the other case, she represented a teenager in a matter to overturn his illegal and indefinite suspension from his public high school and to ensure that he received the services required to graduate on time from high school.

In the case in which Ms. Pasha represented the grandmother, she stepped into the factually and procedurally convoluted matter early in the case, when a request for an administrative hearing on the supported neglect allegation had been denied. She worked quickly to understand and clarify the factual and procedural history of the case, to understand the legal landscape in which the decisions had been made, and to plot a strategy for advocacy based on as yet untested substantive theories and procedures. Ms. Pasha impressed me with her ability to independently research and navigate the applicable statutory, regulatory, and policy framework in order to devise a number of alternative strategies for accomplishing her client's legal goals. She quickly gained the trust of her client, who called Ms. Pasha regularly to provide updates, check in, and seek guidance on next steps. Early in the semester, Ms. Pasha attended a meeting with the child welfare staff as well as a hearing on the child's mother's child welfare case in order to support and advocate for her client. Despite resistance and, at times, hostility from the clinical staff and their agency attorney, Ms. Pasha was able to effectively advocate to ensure that her client's voice was heard and to make progress on her client's goals. Later in the semester, Ms. Pasha further demonstrated her strong analytical and writing skills when she assembled a grievance -- a paper appeal of sorts -- to overturn the neglect finding. Seeking a determination on the grievance also made clear her persistence as she had to doggedly pursue child welfare records as well as a response from the child welfare agency on the appeal. This semester, Ms. Pasha has broadened her writing skills through her drafting of a complaint in state court to appeal the adverse decision on the grievance. The drafting of the complaint has required her to think strategically both in terms of the procedural mechanism to pursue the claims as well as the most compelling substantive claims. Through this strategizing, Ms. Pasha has again demonstrated her ability to understand and fit together a variety of areas of law, which for the drafting of the complaint includes administrative, procedural, jurisdictional, common law, and equity.

While Ms. Pasha navigated the child welfare case first semester, she also quickly learned the factual, system-related, and legal information in her other case in which she represented the teenager excluded from school. Early in the semester, Ms. Pasha and her law student partner effectively engaged in negotiation with school staff and the school district attorney in order to avoid further disciplinary action toward her client. She also mastered the legal and factual aspects of the case in order to present a dynamite oral argument at a motion to dismiss hearing at the end of the semester, an argument so well-articulated that opposing counsel went out of her way to compliment Ms. Pasha on the argument.

Because Ms. Pasha demonstrated such excellent analytical skills as well as the ability to quickly understand systems and legal frameworks within which her clients operated, I asked Ms. Pasha this semester to work on a project to create resources and tools for grandparents and other kin with a family member in the custody of the child welfare agency. She enthusiastically welcomed this project and has continued to show the same dedication and legal acumen she exhibited in her cases to the task of creating pro se materials. Had COVID-19 not spoiled our plans, Ms. Pasha would have been positioned to host an afternoon-long legal aid clinic for kin of children in the child welfare system at a local social services agency at the end of the.academic year in JRAP. In addition to the legal aptitude Ms. Pasha displayed during her academic year in JRAP, she also exhibited the qualities necessary to be an excellent colleague and supervisee. She worked well as a team member on the cases in which she had a law student or social work student partner and worked independently to move the cases along when necessary. Ms. Pasha has also utilized supervision exceptionally well, effectively seeking and implementing feedback that I and other legal experts have provided to her.

Ms. Pasha's work ethic, analytical and writing skills, and collegiality will be an asset in any work environment, and particularly as a judicial clerk. If you have any further questions, please do not hesitate to contact me at 617-552-0265 or by email at jessica.berry@bc.edu.

Sincerely,

Jessica Berry
Visiting Clinical Professor

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The enclosed writing sample is an excerpt from the Note I wrote during the Spring 2020 semester as a Staff Writer for the *Boston College Law Review*. The note was selected for publication. The full Note can be provided upon request.

"A WAIVER OF THE TRIAL ITSELF": THE CONSTITUIONAL THREATS OF EXTENDING *UNITED STATES V. MEZZANATTO* AND CONTRACTUAL SOLUTIONS

INTRODUCTION

Dino Mitchell was barely able to read, had received very little formal education, and had no knowledge of the legal system.[1] When a grand jury had indicted him for conspiracy to transport stolen securities along with several co-conspirators, Mitchell opted to go to trial while the rest of his co-conspirators pleaded guilty.[2] But on his trial date, he entered a plea agreement.[3] This agreement included a clause that waived protections under Federal Rule of Criminal Procedure (FRCP) 11(f) and Federal Rule of Evidence (FRE) 410.[4] As a result of this waiver, any statements he made during plea discussions were admissible against him if the case went to trial.[5]

After entering his guilty plea, Mitchell secured a new attorney and filed a motion to withdraw his plea, arguing that his former

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[1] United States v. Mitchell, 633 F.3d 997, 999 (10th Cir. 2011).

[2] *Id.* Mitchell and his co-conspirators were charged with crime of conspiracy to commit offense or to defraud the United States and transportation of stolen goods, in this case securities. *Id.*; *see* 18 USC §§ 371, 2314 (2018) (codifying the crimes of conspiracy to commit offense or to defraud the United States and transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting). A security is a financial tool that represents a monetary value, usually a stock or a bond. Will Kenton, *Security*, INVESTOPEDIA (Feb. 27, 2020), https://www.investopedia.com/terms/s/security.asp.

[3] *Mitchell*, 633 F.3d at 999.

[4] *Id.* The agreement contained the following clause: "[I]f I withdraw my plea of guilty, I shall assert no claim under . . . Rule 410 of the Federal Rules of Evidence, Rule 11(f) of the Federal Rules of Criminal Procedure . . . that the defendant's statements pursuant to this agreement . . . should be suppressed or are inadmissible at any trial, hearing, or other proceeding." *Id.*; *see* FED. R. CRIM. P. 11(f) (prohibiting guilty pleas and plea statements from being admitted into evidence under FRE 410); FED. R. EVID. 410 (preventing the admission of guilty pleas or plea statements into evidence). Mitchell also stated during the plea colloquy that he had plead guilty voluntarily. *Mitchell*, 633 F.3d at 999. These waivers are commonly used by Federal Prosecutors. *See* United States v. Mezzanatto (*Mezzanatto II*), 513 U.S. 196, 216 (1995) (Souter, J., dissenting) (stating waiver of the inadmissibly of plea discussions have become commonplace); Joseph S. Hall, *Rule 11(e)(1)(C) and the Sentencing Guidelines: Bargaining Outside the Heartland?*, 87 IOWA L. REV. 587, 600-01 (2002) (noting the trend toward including waivers of 410 and 11(f)).

[5] *See* FED. R. CRIM. P. 11 (according with FRE 410); FED. R. EVID. 410. (prohibiting the use of guilty pleas and plea statements as evidence); *Mitchell*, 633 F.3d at 999.

attorney had compelled him to plead guilty.[6] The district court granted Mitchell's motion and granted him a jury trial.[7] Before the trial began, the government filed a motion in limine, seeking to admit the statements Mitchell made in connection with pleading guilty to be used in its presentation of the evidence, or its "case-in-chief."[8] The court granted the motion.[9] The government relied heavily on Mitchell's statements in their case.[10] They stressed in their opening statement that Mitchell had admitted to the offense under oath, reading portions from his plea colloquy where Mitchell admitted to specific facts of the charge, interrogating Mitchell about his guilty plea when he testified, and referring to the guilty plea in their closing argument.[11] The jury convicted Mitchell and sentenced him to twenty-seven months in prison and supervised release for thirty-six months.[12]

Mitchell's case would have played out differently in different courts.[13] If his case had been reviewed by the Supreme Court in 1995,

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[6] *Mitchell*, 633 F.3d at 999. To withdraw a plea, a defendant must show a "fair and just" reason to do so. *Id.* (citing United States v. Yazzie, 407 F.3d 1139, 1142 (10th Cir. 2005) (*en banc*)). The district court denied Mitchell's initial motion. *Id.* Mitchell filed a motion to reconsider a week letter that contained two letters written by his former attorney that evidenced coercion. *Id.* One letter was sent to Mitchell's brother, telling him to advise Mitchell to take the plea. *Id.* The other was to Mitchell himself, highlighting the lower prison sentence he would be entitled to if he entered the plea agreement. *Id.* The letter ended with a note that Mitchell "would be a fool" not to accept the plea deal. *Id.*

[7] *See Id.* (stating the constitutional right to a jury trial outweighed other considerations).

[8] *Id.* at 1000. A motion in limine before trial is a motion that seeks to determine whether a piece of evidence will be admissible at trial. Hon. Robert E. Bacharach, *Motions in Limine in Oklahoma State and Federal Court*, 24 OKLA. CITY U. L. REV. 113, 114 (1999). In its motion, the prosecution referred to Mitchell's waiver of Federal Rule of Evidence (FRE) 410. *Mitchell*, 633 F.3d at 1000. Mitchell opposed the motion, arguing that the use of the statements violated FRE 403. *Mitchell*, 633 F.3d at 1000; *see* FED. R. EVID. 403 (excluding evidence that is more prejudicial than probative).

[9] *Mitchell*, 633 F.3d at 1000. The court extended the rationale of *Mezzanatto* that allowed plea statements to be used for impeachment purposes. *See Mitchell*, 633 F.3d at 1000 (citing *Mezzanatto II*, 513 U.S. at 210) (stating the rationale in *Mezzanatto* that was applied to the use of statements for impeachment was also applicable to the use of statements for the prosecution's case-in-chief).

[10] *Mitchell*, 633 F.3d at 1000.

[11] *Id.* A plea colloquy is a discussion between the defendant and the judge that must occur before a defendant pleads guilty. Danielle M. Lang, Note, Padilla v. Kentucky*: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful* Padilla *Claims*, 121 YALE L. J. 944, 944 (2012). The Fifth amendment and the due process clause require this conversation. *Id*. During the plea colloquy, the judge will issue warnings, informing the defendant of immigration implications and affirming that the defendant is choosing to waive their right to a trial. *Id.*

[12] *Mitchell*, 633 F.3d at 1000.

[13] *See Mezzanatto II*, 513 U.S. at 199, 210 (allowing plea statements to be used for impeachment purposes); *Mitchell*, 633 F.3d at 1006 (allowing plea statements to be used for the government's case-in-chief); United States v. Newbert (*Newbert III*), 504 F.3d 180, 181, 183 (1st Cir. 2007) (holding that a plea was not breached in a case where a defendant withdrew his guilty plea after evidence of his innocence had come to light); United States v. Rebbe, 314 F.3d 402, 408–09 (9th

the Court would have allowed Mitchell's plea statements to come into evidence if he personally testified contrary to his prior statements.[14] If it came before the United States Court of Appeals for the Ninth Circuit, Mitchell's statements would have been allowed for rebuttal purposes, meaning that they would be admitted if he presented a defense that was contrary to his prior statements.[15] But in the United States Court of Appeals for the Tenth Circuit, Mitchell's breach of his plea agreement triggered the use of his statements for the prosecution's case-in-chief.[16] This lack of clarity between circuits about what use plea statements can be put to with a valid FRE 410 waiver and the Supreme Court's failure to clarify the issue is problematic because these three scenarios could have vastly different outcomes.[17]

Like Mitchell, most criminal defendants typically enter plea agreements with the government rather than risking the uncertainty of a jury trial.[18] Congress encourages these agreements because they promote efficiency and save judicial resources.[19] They also often provide defendants with more favorable sentences.[20] Frequently these agreements include provisions that cause defendants to waive certain rights.[21] FRE 410 and FRCP 11(f) prevent the admissibility of

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Cir. 2002) (allowing the use of plea statements for rebuttal purposes); United States v. Burch, 314 F.3d 1315, 1321 (D.C. Cir. 1998) (enforcing a plea waiver that allowed plea statements to be used for the government's case-in-chief).

[14] *See Mezzanatto II*, 513 U.S. at 204–05, 210 (enforcing waivers for impeachment purposes).

[15] *See Rebbe*, 314 F.3d at 402, 408–09 (approving the use of plea waivers for rebuttal).

[16] *See Mitchell*, 633 F.3d at 1006 (allowing the use of plea waivers for the prosecution's case-in-chief).

[17] *See Mezzanatto II*, 513 U.S. at 217 (Souter, J., dissenting) (criticizing the majority for failing to address the likely expansion of their holding to case-in-chief waivers and stating that a case-in-chief waiver is the effective waiver of a trial); *Rebbe*, 314 F.3d at 402, 408–09 (allowing plea statements to be used for rebuttal purposes). *But see, Mitchell*, 633 F.3d at 1000 (supporting a case-in-chief waiver); *Burch*, 314 F.3d at 1321 (same).

[18] John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RES. CTR. (June 12, 2018), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.

[19] *See* United States Mezzanatto (*Mezzanatto I*), 998 F.2d 1452, 1455 (9th Cir. 1993), *rev'd* 513 U.S. 196 (1995) (noting the policy behind the encouragement of plea agreements is to foster efficiency and to conserve judicial resources).

[20] Joel Mallard, Comment, *Putting Plea Bargaining on the Record*, 162 U. PA. L. REV. 683, 688 (2014). Because prosecutors wish to avoid the time and expense of trial, they incentivize defendants to enter agreements by offering more lenient sentences. *Id.* This can be done by offering to not bring additional charges or to drop existing ones, or by recommending a particular sentence range to the court. *Id.*

[21] Robert E. Scott & William J. Stuntz, *Plea Bargaining as a Contract*, 101 YALE L. J. 1909, 1909 (1992). These rights include the right to testify on one's own behalf, the right to a jury trial, or the right to an appeal. *Jones v. Barnes,* 463 U.S. 745, 751 (1983) (listing waivable right of

statements made during plea discussions from being used as evidence in trials, but increasingly prosecutors include a clause waiving these protections.[22] In 1995, the Supreme Court in *United States v. Mezzanatto* held that waivers of FRE 410 and FRCP 11(f) are enforceable for impeachment purposes.[23] Circuit courts have extended this reading and allow prosecutors to admit the statements into evidence for rebuttal and case-in-chief.[24] This expansion of *Mezzanatto* poses threats to the constitutional rights of defendants and threatens the plea-bargaining system at large.[25]

Part I of this Note examines the formation of plea agreements as contracts, provides background on waiver clauses in those agreements, and discusses the seminal case on the subject, *Mezzanatto*.[26] Part II explores the various approaches circuit courts have taken in their interpretation of the *Mezzanatto* decision.[27] Part III argues that an expansive reading of *Mezzanatto* infringes the rights of criminal defendants and, accordingly, proposes reform based in contract principles.[28]

I. THE BASICS OF PLEA AGREEMENTS, CONTRACTS, AND WAIVERS

[Omitted]

A. Defendants' Constitutional Right to a Fair Trial

[Omitted]

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defendants); *see, e.g.*, United States v. Smith, 500 F.3d 1206, 1210 (10th Cir. 2007) (stating a waiver of the right to appeal in a plea agreement enforceable); *United States v. Hare*, 269 F.3d 859, 863 (7th Cir. 2001) (same).

[22] *See* FED. R. CRIM. P. 11 (complying with FRE 410); FED. R. EVID. 410; (prohibiting the admission of guilty pleas and plea statements into evidence) *Mezzanatto II*, 513 U.S. at 216 (Souter, J., dissenting) (stating waiver of the inadmissibly of plea discussions have become commonplace).

[23] *Mezzanatto II*, 513 U.S. at 204–05, 210.

[24] *See id*. (holding waivers allowing the use of plea statements for impeachment purposes are valid); *e.g.*, *Burch*, 314 F.3d 1315, 1321 (D.C. Cir. 1998) (allowing plea statements to be used for the government's case-in-chief); *Rebbe*, 314 F.3d at 408–09 (allowing the use of plea statements for rebuttal purposes).

[25] *See* U.S. CONST. amend VI (ensuring the right to a fair trial); *Mezzanatto II*, 513 U.S. at 211 (Ginsburg, J., concurring) (expressing concern that the use of plea statements for the government's case-in-chief could discourage defendants from entering plea bargains).

[26] *See infra* notes 29–163 and accompanying text.

[27] *See infra* notes 164–279 and accompanying text.

[28] *See infra* notes 280–358 and accompanying text.

B. The Mechanics of Plea Agreements

[Omitted]

C. General Principals of Contracts and Plea Agreements as Contracts

[Omitted]

1. The Formation of Contracts and Their Enforceability

[Omitted]

2. Contracts of Adhesion

[Omitted]

D. The Enforceability of Waiver Clauses in Plea Agreements

[Omitted]

1. *United States v. Mezzanatto* District Court Proceedings

[Omitted]

2. The Ninth Circuit's Reversal of the District Court's Decision in *United States v. Mezzanatto*

[Omitted]

3. The Supreme Court Reverses the Ninth Circuit and Finds Waiver Clauses Enforceable

[Omitted]

II. THE EXTENSION OF *MEZZANATTO*

[Omitted]

A. Differing Approaches to Waiver Clauses in Withdrawn Pleas

[Omitted]

B. The Use of Plea Statements for Impeachment and Rebuttal Purposes

[Omitted]

C. The Use of Plea Statements for the Government's Case-in-Chief

[Omitted]

III. CIRCUIT COURTS' EXTENSION OF THE HOLDING IN *MEZZANATTO* THREATENS DEFENDANTS' RIGHT TO A FAIR TRIAL

[Omitted]

A. Case-in-Chief and Rebuttal Waivers Threaten Defendants' Right to a Fair Trial

Circuit courts expansive reading of *Mezzanatto* threatens defendants' constitutional right to a fair trial.[29] Defendants arguing against the enforceability of FRE 410 and FRCP 11(f) case-in-chief waivers have rightly argued that enforcing such waivers would likely inhibit plea bargaining, thereby frustrating the clear congressional intent behind the rules.[30] In 1998, in *United States v. Burch*, the D.C. Circuit erroneously dismissed this tremendous policy concern by placing importance on the particular facts of the case—which involved a defendant that signed the waiver *after* engaging in plea discussions—rather than considering the more general merits of this argument.[31] According to the court, this particular defendant was not discouraged from entering plea agreements by a case-in-chief waiver more than an impeachment one because he had already entered plea discussions when he signed it.[32] Later courts, however, have unfortunately relied on *Burch*, using it as justification to enforce case-in-chief waivers, many of which were not signed after entering plea negotiations.[33] For example, proffer agreements are usually signed as a prerequisite for entering a plea agreement, and the defendant will almost always sign

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[29] *See* U.S. CONST. amend VI. (establishing the right to a fair trial for criminal defendants); United States v. Rebbe, 314 F.3d 402, 408–09 (9th Cir. 2002) (allowing the use of plea statements for rebuttal purposes); United States v. Burch, 156 F.3d 1315, 1321 (D.C. Cir. 1998) (expanding FRE 410 waivers to allow evidence for the use in the prosecution's case-in-chief); Mueller, *supra* note 109, at 1081 (observing that rebuttal evidence is more threatening than impeachment evidence because severely limits a defendant's defense strategy).

[30] *See Burch*, 156 F.3d at 1322 (presenting a defendant's argument that 410 waivers frustrate Congress's purpose for enacting the rule).

[31] *See id.* (enforcing a case-in-chief waiver without considering the implications on future cases). The D.C. Circuit in *Burch* ultimately extended the holding in *Mezzanatto* to allow statements to be used for the prosecution's case-in-chief.[31] *Id.* at 1321.

[32] *Id.* at 1322.

[33] *See, e.g.*, United States v. Sylvester, 583 F.3d 285, 289 (5th Cir. 2009) (relying on rationale in *Burch* to allow use of plea statements for the government's case-in-chief).

the agreement before plea discussions begin.[34] Courts in favor of an expansive reading of *Mezzanatto* focus on the "knowing and voluntary" nature of the agreement.[35] These courts fail to consider the vast differences in the results of impeachment waivers from case-in-chief waivers.[36] Defendants only trigger impeachment waivers when they choose to testify while they activate case-in-chief waivers as soon as they breach agreement.[37]

Additionally, the use of case-in-chief waivers will likely discourage defendants from entering plea discussions.[38] The majority in *Mezzanatto* dismissed that concern by reasoning that although some criminal defendants may be discouraged from participating in the plea bargaining process, many prosecutors would not be willing to without a waiver clause.[39] Circuit courts have adopted this rationale when enforcing case-in-chief waivers.[40] The *Mezzanatto* Court failed to contemplate the idea that public policy concerns could potentially supersede the presumptive validity of waivers.[41] The Court unfortunately does not identify what those public policy reasons are, but compelling justifications include preventing false convictions and protecting the integrity of the criminal justice system.[42] As Justice

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[34] *See* Smith, *supra* note 225, at 810 (stating that proffer statements are usually signed before plea discussions and often contain 410 waivers); United States v. Jiménez-Bencevi, 788 F.3d 7, 10 (1st Cir. 2015) (signing a proffer before plea discussions).

[35] *See United States v. Jim*, 786 F.3d 802, 813 & n.6 (10th Cir. 2015) (expanding the rationale in *Mezzanatto* to case-in-chief waivers); *Sylvester*, 583 F.3d at 289 (same); *Fifer*, 206 F. App'x at 509–10 (same); *Young*, 223 F.3d at 911 (same); *Burch*, 156 F.3d at 1321 (same).

[36] Robison, *supra* note 268, at 674–75 (stating that case-in-chief waivers have a much greater effect on the plea-bargaining process than impeachment waivers).

[37] Mueller, *supra* note 109, at 1081 (noting that impeachment waivers discourage defendants to testify).

[38] Robison, *supra* note 268, at 674–75 (stating that case-in-chief waivers have a much greater effect on the plea-bargaining process than impeachment waivers).

[39] *See Mezzanatto II*, 513 U.S. at 207 (disagreeing with arguments that the enforcement of FRE 410 waivers for impeachment purposes would adversely affect the plea-bargaining process).

[40] *See Jim*, 786 F.3d 802, 813 & n.6 (enforcing case-in-chief waivers); *Sylvester*, 583 F.3d at 289 (same); *Fifer*, 206 F. App'x at 509–10 (same); *Young*, 223 F.3d at 911 (same); *Burch*, 156 F.3d at 1321 (same).

[41] *See Mezzanatto II*, 513 U.S. at 207 (declining to address the public policy implications the presumptive validity of plea waivers); *Jiménez-Bencevi*, 788 F.3d at 17–18 (stating that defendants have incentives to plead guilty when they are innocent); United States v. Newbert (*Newbert III*), 504 F.3d 180, 187–88 (1st Cir. 2007) (refusing to enforce a plea agreement where there was evidence of the defendant's innocence).

[42] *See Mezzanatto II*, 513 U.S. at 207 (declining to identify public policy considerations that could overcome the presumptive validity of waivers); *Newbert III*, 504 F.3d at 187–88 (holding a plea agreement unenforceable when evidence of a defendant's innocence came to light); *Teeter*, 257 F.3d at 25–26 (stating plea agreements could be voided in the interests of justice).

Souter observed in his dissent in *Mezzanatto*, the use of plea statements for the government's case-in-chief nullifies the need for a trial because the outcome is almost certain.[43] Thus, the circuit courts' failure to acknowledge the vast difference between the effects of impeachment waivers and case-in-chief waivers threatens the integrity of the criminal justice system and the constitutional rights of criminal defendants.[44]

The enforcement of waivers allowing the use of plea statements for rebuttal purposes has nearly the same outcome as case-in-chief waivers.[45] When a waiver approves plea statements to be used for rebuttal purposes, the prosecution can use those statements to refute any evidence presented in the trial, thus significantly limiting the defendant's opportunity for a competent defense.[46] Although a defendant can choose not to testify without significant harm to their defense strategy, a waiver that allows statements to be used for rebuttal allows the prosecution to rebut any evidence presented, any statement made by another witness, or any argument made by the defendant's attorney.[47] Courts have consistently considered a defendant's right to a competent defense to hinge solely on the aptitude of their attorney.[48] The use of rebuttal waivers, however, severely handicaps any defense strategy, even for the most competent attorney.[49] Thus, rebuttal waivers essentially rob criminal defendants of the right to a competent defense.[50] Consequently, instead of continuing to expand the interpretation of *Mezzanatto*, courts should allow waiver statements

[43] *Id.* at 217 (Souter, J., dissenting); Keck, *supra* note 268, at 1399 (noting that a case-in-chief waiver replaces the need trial).

[44] *See* U.S. CONST. amend VI. (establishing the right to a fair trial); *Jim*, 786 F.3d 802, 813 & n.6 (allowing case-in-chief waivers); *Sylvester*, 583 F.3d at 289 (same); *Fifer*, 206 F. App'x at 509–10 (same); *Young*, 223 F.3d at 911 (same); *Burch*, 156 F.3d at 1321 (same).

[45] *See, e.g.*, *Rebbe*, 314 F.3d at 408 (limiting a defendant's defense strategy); *see* Mueller, *supra* note 109, at 1081 (stating rebuttal waivers allow witnesses' and attorneys' statements to be contradicted by the defendant's prior plea statements).

[46] *See Rebbe*, 314 F.3d at 408 (stating that the defendant was prohibited from presenting evidence or arguments that contradicted his plea statements).

[47] *See* Mueller, *supra* note 109, at 1081 (stating rebuttal waivers severely limit the defense's strategy).

[48] *See* Giles, *supra* note 42, at 1385–86 (stating that courts only consider the actions of a defendant's attorney when evaluating if he received the right to a competent defense).

[49] *See* Mueller, *supra* note 109, at 1081 (stating rebuttal waivers hampers defense strategies).

[50] *See id.* (noting restrictions imposed by rebuttal waivers are harmful to a defense).

that permit the admittance of plea statements solely for impeachment purposes.[51]

B. Contractual Solutions for a Constitutional Problem

Contract law permits courts to avoid enforcing agreements that are contrary to public policy.[52] Given the adverse policy implications of FRE 410 and FRCP 11(f) waivers, courts should turn to contract principles to void these waivers.[53] A contract is void on public policy grounds when there is legislation that renders it unenforceable or if the policy justifications to void the contract clearly outweigh the reasons to enforce it.[54] The considerations when deciding if public policy justifications eclipse the reasons to enforce a contract's term are: 1) the legislature or judiciary's support of the policy, 2) whether the enforcement of that term would undermine that policy, 3) whether the agreement was a product of intentional misconduct, and 4) the nexus of that misconduct and the term.[55]

There are two major policies that discourage waivers permitting the admission of plea statements for uses besides impeachment: 1) promoting plea bargaining, and 2) ensuring that defendants receive fair trials.[56] Congress has made it clear that encouraging plea bargaining benefits the criminal justice system.[57] The United States Constitution ensures defendants the right to a fair trial.[58] Although the Court in *Mezzanatto* interpreted Congress's silence on whether the rules could be waived as a presumption of their waivability of the rules, there are strong reasons to believe that this interpretation

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[51] *See Mezzanatto II*, 513 U.S. at 217 (Souter, J., dissenting) (predicting that the *Mezzanatto* decision would be read expansively, leading to the use of case-in-chief waivers).

[52] *See* RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981) (stating that contracts that violate public policy are unenforceable).

[53] *See* United States v. Henry, 758 F.3d 427, 431 (D.C. Cir. 2014) (stating plea agreements are governed by contract principles); RESTATEMENT (SECOND) OF CONTRACTS § 178 (stating that contracts that violate public policy are void).

[54] RESTATEMENT (SECOND) OF CONTRACTS § 178.

[55] *Id.* § 178(3).

[56] *See* U.S. CONST. amend VI. (ensuring right to a fair trial); *Mezzanatto I*, 998 F.2d at 1455 (noting congress' intention to promote plea bargaining).

[57] PUB. L. 94–149, 89 STAT. 805 (1975) (modifying FRE 410, which previously allowed for the admission of plea statements for impeachment purposes); FED. R. EVID. 410 (1974) (permitting statements to be used for impeachment); H.R. REP. NO. 94–414, at 10 (1975) (Conf. Rep.), *as reprinted in* 1975 U.S.C.C.A.N. 713, 714; S. REP. NO. 99–1277, at 10 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7057.

[58] U.S. CONST. amend VI.

inevitably frustrates Congress's purpose for the rules' creation.[59] Enforcing these waiver clauses that allow statements to be used for rebuttal and the government's case-in-chief will discourage defendants from participating in the criminal justice system, and threaten the constitutional rights of criminal defendants, thus it does not support either policy.[60] Although the *Mezzanatto* Court dismissed this argument in regard to impeachment waivers, it is unclear that the Court would have done the same when evaluating a rebuttal or case-in-chief waiver.[61] The enormous cost of engaging in plea discussions that may or may not result in a deal will likely prove too risky for some criminal defendants.[62] It is unlikely that there is intentional wrongdoing in the drafting of plea agreements, so it is also unlikely that courts would hold these agreements to be unenforceable for these policy reasons.[63] The policy reasons clearly outweigh the benefits of the enforcement of the term, however, thus courts should hold these types of waivers to be unenforceable.[64]

Although the waiver terms may be void for public policy reasons, that does not necessarily void the entire plea agreement.[65] It is not unprecedented for judges to refuse to enforce a clause in an agreement.[66] In *Teeter*, the First Circuit did not enforce a waiver of the right to appeal that was contractually valid in the interests of justice.[67] The First Circuit still affirmed the defendant's conviction, but the court struck the waiver clause in her plea agreement.[68] Similarly, that same

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[59] *See Mezzanatto II*, 513 U.S. at 203–04 (stating the presumption of waivability does not undermine Congress's intention when it enacted FRE 410).

[60] *See* U.S. CONST. amend VI (establishing the right to a fair trial).; *Mezzanatto I*, 998 F.2d at 1455 (stating that criminal defendants will be discouraged from entering plea agreements if 410 waivers are enforceable).

[61] *See Mezzanatto II*, 513 U.S. at 207 (suggesting that policy justifications could overcome the presumption of waivability in the context of impeachment waivers).

[62] *See Mezzanatto II*, 513 U.S. at 217 (Souter, J., dissenting) (implying that case-in-chief waivers would discourage criminal defendants from engaging in plea discussions because of the high risk).

[63] *See Mezzanatto II*, 513 U.S. at 207 (stating that prosecutors have limited resources and must make decisions about which testimony is credible, thus they condition participation in the agreement to protect their time and resources).

[64] *See* RESTATEMENT (SECOND) OF CONTRACTS § 178 (stating a contract may be unenforceable for public policy reasons).

[65] *See* JAK Productions, Inc. v. Wiza, 986 F.2d 1080, 1087 (7th Cir. 1993) (modifying a non-competition agreement by narrowing the terms).

[66] *Teeter*, 257 F.3d at 25–26.

[67] *Id.* The court did not define what those terms were, but said it would be clear based on case-specific facts. *Id.* at 26.

[68] *Id.* at 31.

court, in *Newbert*, openly reformed a valid agreement because there was evidence that the defendant was actually innocent.[69] Although the court did not state that plea agreements are adhesion contracts and thus should be read more critically by courts, their rationale supports that idea.[70] The court acknowledged that it should interpret ambiguities against the government, as the drafter of the agreement.[71] It also noted that the defendants are in a weaker bargaining position because their freedom is at stake.[72] Courts are more likely to reform contracts of adhesion than other contracts because the imbalance of power and the lack of the ability for one party to negotiate is sometimes unfair to the weaker party.[73] The district court unambiguously reformed the contract between Newbert and the government, and the First Circuit upheld that decision.[74] The agreement clearly stated that Newbert could not withdraw his guilty plea and both parties signed the agreement voluntarily; there was nothing to suggest that the contract was invalid.[75] The fact that this was similar to a contract of adhesion could have influenced the court's decision to intervene.[76] Courts should consider the extreme imbalance of power between prosecutors and criminal defendants and the adhesive nature of plea agreements when

[69] *See Newbert III*, 504 F.3d at 187–88 (declining to enforce a plea agreement when evidence of a defendant's innocence arose); RESTATEMENT (SECOND) OF CONTRACTS § 178 (stating that contracts that violate public policy are unenforceable).

[70] *See Newbert III*, 504 F.3d at 188 (stating that the government is the drafting party and there is an imbalance of power between the parties); Schwartz, *supra* note 89, at 347–48 (stating courts are more likely to reform adhesion contracts than others).

[71] *See Newbert III*, 504 F.3d at 188 (acknowledging that the government is the drafting party so ambiguity should be construed against them); Schwartz, *supra* note 89, at 346 (stating that the stronger party is usually the drafter of a contract of adhesion).

[72] *Newbert III*, 504 F.3d at 187.

[73] Schwartz, *supra* note 89, at 347–48 (acknowledging courts are more often intervene in contracts of adhesion).

[74] *See Newbert III*, 504 F.3d at 187–88 (upholding the district court decision); *Newbert I*, 471 F.Supp.2d at 199 (choosing not to enforce a valid term of a plea agreement).

[75] *See Newbert III*, 504 F.3d at 187–88 (upholding the district court's decision not to enforce a valid term of a plea agreement). *Newbert I*, 471 F.Supp.2d at 199 (choosing not to enforce a valid term of a plea agreement). The contract had all the required elements: an offer, an acceptance, and consideration and was not entered to unknowingly or involuntarily. *See* RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (AM. LAW. INST. 1981) (stating the required elements for a valid contract); Schwartz, *supra* note 89, at 347 (stating that contracts must be voluntary to be enforceable).

[76] *See Newbert I*, 471 F.Supp.2d at 199 (not enforcing a contract with valid components); Schwartz, *supra* note 89, at 347–48 (acknowledging courts are less reluctant to reform adhesion contracts than others).

evaluating their enforceability.[77] If the terms of the agreement are clearly unfair to the criminal defendant, then courts should refuse to enforce those unconscionable agreements.[78]

Additionally, there are strong public policy reasons to not enforce a contract where there is a likelihood that the defendant is actually innocent.[79] The goal of the criminal justice system is to seek the truth, so enforcing an agreement that punishes the wrong person when there is evidence to support his innocence would clearly violate public policy, and judges may hold contracts that violate public policy to be unenforceable.[80] Courts should follow the example set in *Newbert* and *Teeter* and refuse to enforce plea agreements with waivers of FRE 410 and FRCP 11(f) when the court believes that the enforcement of those agreements runs counter to the interests of justice.[81] Courts should consider fairness, rather than enforcing a plea agreement simply because the defendant entered it "knowingly and voluntarily."[82] For example, in cases where the court allows a defendant to withdraw a plea, the court should also be able to void the waiver clause although the defendant technically breached their plea agreement.[83] The court should not consider a withdrawal it endorses to be a breach, or at the very least, such action should not trigger the admission of plea statements.[84] Because a defendant's freedom is at stake, courts should

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[77] *See Newbert III*, 504 F.3d at 187 (acknowledging the power discrepancy between criminal defendants and prosecutors); Schwartz, *supra* note 89, at 347–48 (noting courts are more likely to intervene in a contract of adhesion in the commercial context).

[78] *See* THI of N.M. at Hobbs Ctr., LLC v. Spradlin, 532 Fed. Appx. 813, 818 (10th Cir. 2013) (stating that contracts are unconscionable when they are clearly unjust to the weaker party).

[79] *See Newbert III*, 504 F.3d at 187–88 (refusing to enforce a plea agreement where there was evidence of the defendant's innocence); RESTATEMENT (SECOND) OF CONTRACTS § 178) (stating that contracts that violate public policy are unenforceable).

[80] *See Newbert III*, 504 F.3d at 187–88 (refusing to enforce a plea agreement where there was evidence of the defendant's innocence); N. Mariana Islands v. Bowie, 243 F.3d 1109, 1114 (9th Cir. 2001) (stating that the purpose of the criminal justice system is to seek the truth); RESTATEMENT (SECOND) OF CONTRACTS § 178 (stating contracts that violate public policy are unenforceable).

[81] *Newbert III*, 504 F.3d at 187–88 (refusing to enforce a plea agreement uwhen evidence of a defendant's innocence arose); *Teeter*, 257 F.3d at 25–26 (stating plea agreements could be voided in the interests of justice).

[82] *See* Mueller, *supra* note 109, at 1076–77 (criticizing courts that do not consider fairness when evaluating the validity of waiver clauses in plea agreements).

[83] *See, e.g.*, *Newbert III*, 504 F.3d at 181, 183 (refusing to enforce a plea agreement when the defendant breached the plea by withdrawing with the permission of the court).

[84] *See id.* at 188–89 (Boudin, J. concurring) (stating that although the majority had found a withdrawn plea did not constitute a breach, the court could have also chosen to not enforce the waiver clause); *Teeter*, 257 F.3d at 25–26 (refusing to enforce a plea because it would result in a miscarriage of justice).

not hesitate to employ principles of contract law that were developed to protect weaker bargaining parties in plea agreements.[85]

C. Waiver Clauses and Prosecutorial Ethics

[Omitted]

CONCLUSION

Circuit courts' expansive interpretation of *United States v. Mezzanatto* poses risks to the rights of criminal defendants, as well as the functionality of the criminal justice system. The enforcement of FRE 410 and FRCP 11(f) waivers that allow for the use of plea statements for rebuttal purposes or the prosecution's case-in-chief discourages plea bargaining and threatens a defendant's right to a fair trial. As a result, courts should apply contract principles to plea agreements that contain these waivers and hold them to be unenforceable and void for public policy reasons. Courts should further strike these clauses from plea agreements if they go against the interest of justice. Courts should not hesitate to intervene in these agreements because they are adhesion contracts, and are thus more likely to be unconscionable. Additionally, these waivers violate prosecutorial ethics because they do not promote justice and are likely to result in wrongful convictions.

CHERYLANN M. PASHA

[85] *See Newbert III*, 504 F.3d at 185 (applying traditional contract principles to a plea agreement); RESTATEMENT (SECOND) OF CONTRACTS § 178 (stating that contracts that run contrary to public policy are unenforceable).

Applicant Details

First Name	**Katherine**
Middle Initial	**E**
Last Name	**Pauly**
Citizenship Status	**U. S. Citizen**
Email Address	**pauly.k22@law.wlu.edu**
Address	**Address** **Street** **203 N. Main Street APT 1** **City** **Lexington** **State/Territory** **Virginia** **Zip** **24450** **Country** **United States**
Contact Phone Number	**812-929-9993**

Applicant Education

BA/BS From	**Miami University of Ohio**
Date of BA/BS	**May 2019**
JD/LLB From	**Washington and Lee University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=54704&yr=2009**
Date of JD/LLB	**May 13, 2022**
Class Rank	**50%**
Law Review/ Journal	**Yes**
Journal(s)	**Washington and Lee Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**John W. Davis Appellate Advocacy Competition** **Robert J. Grey, Jr. Negotiations Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

McHenry, Michael
michael.mchenry@judicial.state.co.us
Haan, Sarah
haans@wlu.edu

References

Professor Alan Trammell (atrammell@wlu.edu / (540) 458-8329);
Professor Mona Houck (mhouck@wlu.edu / (540) 458-8522)

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Katherine E. Pauly
203 N. Main Street, Apt. 1, Lexington, VA 24450 | 812-929-9993 | pauly.k22@law.wlu.edu

June 2, 2021

The Honorable Elizabeth W. Hanes
Magistrate Judge
United States District Court for the Eastern District of Virginia
Spottswood W. Robinson III and Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, Virginia

Dear Judge Hanes:

I am a rising third-year law student at Washington and Lee University School of Law. I am writing to apply for a post-graduate clerkship with your chambers. I will bring my experience working in judicial chambers, my varied course work in the federal system, and my legal research and writing skills with me to contribute to your chamber. Additionally, I believe the experience in your chambers will help prepare me to become a more qualified candidate for my long-term goal of becoming an Assistant United States Attorney.

I will bring advanced legal research and writing skills from my past experience in judicial chambers. Between my first and second year, I interned for Chief Judge William Bain and for Judge Michael McHenry of the 4th Judicial District of Colorado in Colorado Springs. I spent the summer drafting memos and orders, researching legal issues, and discussing complex cases. The time I spent with both judges helped me further develop my legal research skills as well as learn how a highly functioning judicial chambers works. I will also bring my experiences gained from my time with the United States Attorney's Office for the District of Arizona. This summer, I will be working on preparing legal memos, assisting with trial preparation, and drafting plea agreements. This experience will further my legal research and writing skills and enhance my familiarity with federal law and procedure.

Additionally, I possess a strong work ethic and an ability to work well in a team environment. As a Marketing team member at an artificial intelligence company before law school, I identified an area for improvement between two teams. I took initiative to interview team members, test different strategies, and create a strategy pitch to improve communication between the two teams which was eventually implemented by the company. These skills will help me tackle complex legal issues and work with your staff to make a contribution to your chambers.

Thank you for your time and consideration, and I hope to have the chance to speak with you further.

Sincerely,

Katie Pauly

Katherine E. Pauly

203 N Main Street, Apt. 1, Lexington, VA 24450 | 812-929-9993 | pauly.k22@law.wlu.edu

Education

Washington and Lee University School of Law, Lexington, VA
Candidate for J.D., May 2022 (GPA: 3.610– top 40%)

- *Washington and Lee Law Review*, Lead Online Editor
- Student Judicial Council, 2020-2021 At Large Law School Justice (elected to investigate and hear complaints of alleged student misconduct)
- Admissions Law Ambassador (selected to lead tours, communicate with prospective students)
- Recipient, The H. Taylor Jones '34 L Scholarship

Miami University, Oxford, OH
B.A., *cum laude*, English Literature; B.A., *cum laude*, Entrepreneurship, Minor in Spanish, May 2019

- Equestrian Team; Phi Mu Fraternity, Membership Committee; Women in Business

Experience

United States Attorney's Office for the District of Arizona, Phoenix, AZ
Summer Intern, June 2021 – Present

Washington and Lee University School of Law, Lexington, VA
Research Assistant – Professor Alan Trammell, August 2020 – Present

- Researching and writing focused on civil procedure and conflict of laws issues
- Draft memoranda, conduct research, and assist in framing of legal issues for multiple articles

4th Judicial District of Colorado, Colorado Springs, CO
Summer Law Clerk– Judge Michael McHenry and Chief Judge William Bain, May 2020 – July 2020

- Drafted memos and court orders on issues ranging from restitution to indeterminate sentencing
- Researched and presented information on the Confrontation Clause and its relation to remote trials during COVID
- Attended pre-trial hearings and domestic hearings; witnessed criminal court proceedings

Miami University, Oxford, OH
Entrepreneurship Internship: Lead Student Coordinator, August 2017 – May 2019

- Worked with professor Chris Sutter to host University's Social Innovation Weekend, geared towards solving social issues in Ohio and surrounding states
- Led three committees of 8-12 students each to market, plan, and host program

Miami University's Discovery Center: Student Researcher, August 2018 – May 2019

- Researched and strategized grant proposals focused on regional issues, including African American infant mortality and Neighborhood Navigator Program

Narrative Science, Chicago, IL
Marketing Internship: Product Marketing Intern, May 2018 – August 2018

- Created strategic plan, later implemented by team directors, to re-invent relationship between Customer Success and Marketing groups; analyzed competitive landscape for launch of new product, created plan and segmentation recommendation

Interests

Crafting custom stained glass pieces; riding and training horses

WASHINGTON AND LEE UNIVERSITY
OFFICE OF THE UNIVERSITY REGISTRAR
Lexington, Virginia 24450-2116
540.458.8455

Student's Name: Ms. Katherine Elizabeth Pauly
Pauly, Katherine E.
Entered: 08/12/2019 as LAW:FIRST-YEAR STU
Major:

Date Produced: 06/02/2021
Current Program: Law
Class: 2022
Current Status: On Campus
Other Ed: BA MIAMI UNIV Oxford OH 45056

SSN: ***-**-4848
Student ID: 1741198
Birthdate: 10/20/****

	COURSE	ATT	COM	GRADE	POINTS
LAW-FALL SEMESTER 2019-20					
LAW 109	CIVIL PROCEDURE	4.0	4.0	A-	14.68
LAW 140	CONTRACTS	4.0	4.0	B	12.00
LAW 163	LEGAL RESEARCH	0.5	0.5	A-	1.84
LAW 165	LEGAL WRITING I	2.0	2.0	B+	6.66
LAW 190	TORTS	4.0	4.0	B+	13.32
Term	Cmpl Cr: 14.5 GPA Pts: 48.50 GPA Cr: 14.5 GPA: 3.345				
Cumul	Cmpl Cr: 14.5 GPA Pts: 48.50 GPA Cr: 14.5 GPA: 3.345				

The COVID-19 pandemic required significant academic changes.
Unusual enrollment patterns and grading reflect the disruption
of the time, not necessarily the student's work.

	COURSE	ATT	COM	GRADE	POINTS
LAW-SPRING SEMESTER 2019-20					
LAW 130	CONSTITUTIONAL LAW	4.0	4.0	CR	0.00
LAW 150	CRIMINAL LAW	3.0	3.0	CR	0.00
LAW 163	LEGAL RESEARCH	0.5	0.5	CR	0.00
LAW 166	LEGAL WRITING II	2.0	2.0	CR	0.00
LAW 179	PROPERTY	4.0	4.0	CR	0.00
LAW 195	TRANSNATIONAL LAW	3.0	3.0	CR	0.00
Term	Cmpl Cr: 16.5 GPA Pts: 0.00 GPA Cr: 0.0 GPA: 0.000				
Year	Cmpl Cr: 31.0 GPA Pts: 48.50 GPA Cr: 14.5 GPA: 3.345				
Cumul	Cmpl Cr: 31.0 GPA Pts: 48.50 GPA Cr: 14.5 GPA: 3.345				

	COURSE	ATT	COM	GRADE	POINTS
LAW-FALL SEMESTER 2020-21					
LAW 201	ADMINISTRATIVE LAW	3.0	3.0	B+	9.99
LAW 216	BUSINESS ASSOCIATIONS	4.0	4.0	B+	13.32
LAW 285	EVIDENCE	3.0	3.0	A-	11.01
LAW 340	JURISPRUDENCE SEMINAR	2.0	2.0	A	8.00
LAW 385P	NEGOTIATION/CONFLICT RES PRAC	2.0	2.0	A	8.00
Term	Cmpl Cr: 14.0 GPA Pts: 50.32 GPA Cr: 14.0 GPA: 3.594				
Cumul	Cmpl Cr: 45.0 GPA Pts: 98.82 GPA Cr: 28.5 GPA: 3.467				

	COURSE	ATT	COM	GRADE	POINTS
LAW-SPRING SEMESTER 2020-21					
LAW 263	DEATH PENALTY	2.0	2.0	A	8.00
LAW 265	CRIMINAL PROCEDURE-ADJUDICATIO	3.0	3.0	A	12.00
LAW 300	FED JURISDICTION & PROCEDURE	3.0	3.0	A-	11.01
LAW 364	MERGERS AND ACQUISITIONS	2.0	2.0	A	8.00
LAW 390	PROFESSIONAL RESPONSIBILITY	3.0	3.0	A	12.00
Term	Cmpl Cr: 13.0 GPA Pts: 51.01 GPA Cr: 13.0 GPA: 3.924				
Year	Cmpl Cr: 27.0 GPA Pts: 101.33 GPA Cr: 27.0 GPA: 3.753				
Cumul	Cmpl Cr: 58.0 GPA Pts: 149.83 GPA Cr: 41.5 GPA: 3.610				

	COURSE	ATT	COM
LAW-FALL SEMESTER 2021-22 CURRENT OR FUTURE REGISTRATION			
LAW 233	CRIMINAL PROCEDURE-INVESTIGATI	3.0	
LAW 407	SKILLS IMMERSION - LITIGATION	2.0	
LAW 412	SENTENCING LAW AND POLICY	3.0	
LAW 428P	TRIAL ADVOCACY PRACTICUM	3.0	
LAW 446P	VETERANS LAW PRACTICUM	4.0	

***** END OF TRANSCRIPT *****

(continued in next column)

Registr

February 25, 2021

Re: Katy Pauly, clerkship applicant

To Whom It May Concern,

Katy Pauly was a law clerk for me in the summer of 2020 here in the 4th Judicial District of Colorado. As a District Court Judge for the State of Colorado I handle criminal, civil, and domestic dockets. Ms. Pauly was responsible for researching the law and drafting memoranda and proposed orders for me. I have been on the bench for ten years and have supervised numerous law clerks from across the country during that time. (I happen to also administer our bench's summer law clerk program, so I am responsible for hiring and supervising approximately eight law clerks each summer.)

I can confidently state that Ms. Pauly is in the top 10% of the students who have clerked for me. She is intelligent. She is a serious student of the law. Her legal research was thorough and deep. She has mastered the fundamentals of legal writing. In an effort to hone her writing skills further, she and I spent much time discussing ways to make her writing more concise without losing clarity. In particular I recall a memo she prepared for me regarding the Confrontation Clause and witness testimony by videoconference during a pandemic. She was sensitive to unsettled questions in this area, and her memo accurately conveyed the existing tensions in the law.

I also found Ms. Pauly to be very poised and professional. I believe she should receive serious consideration for a clerkship.

Sincerely,

Michael P. McHenry
District Court Judge
4th Judicial District of Colorado

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 10, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to enthusiastically recommend Katherine Pauly for a clerkship in your chambers. Katie is academically gifted with strong organizational skills and a passion for law. I have had the pleasure of teaching Katie in three very different classes over two semesters: two business law courses (one large-enrollment and one small) and the required Professional Responsibility course. Although all three ended up being synchronous online courses, they were different enough in content and format to give me a comprehensive picture of Katie's many strengths as a law student.

Katie stood out among her peers in all three classes. The 2020-2021 school year was extremely challenging: W&L eliminated mid-semester breaks and moved many classes fully online, while requiring students to follow rigorous health protocols. In the Fall, in the demanding Business Associations course, Katie gave a solid performance, distinguishing herself for her smart (and quick) answers to Socratic questioning, as well as her voluntary in-class participation.

In the Spring, in Professional Responsibility, Katie showed superb ethical reasoning and earned the highest grade, an A. In Mergers & Acquisitions, Katie was the most consistently prepared student in the class; she grasped the complicated material quickly and excelled, also earning an A. W&L does not allow professors to give a grade of "A+" but if it did, I would have given Katie an A+ in Mergers & Acquisitions.

Katie's preparation and engagement in Zoom classes, particularly in the Spring, were outstanding—far above what other students delivered. In Mergers & Acquisitions, Katie made a regular practice of meeting with me individually to go over her class notes and ask questions. She was the only student in the course to do so. As a result of her excellent preparation and work ethic, Katie was able to contribute significantly to our in-class discussions, and her questions and comments revealed sharp analytical thinking. While some of her classmates really struggled to stay motivated and on-task in online courses, Katie adjusted to the class environment and excelled. Her resilience under pressure suggests that she will make a terrific law clerk.

Katie came to me early in the Spring semester to express her serious interest in clerking. She views the clerkship as a valuable opportunity and I have no doubt she will take the work seriously and give it her best effort. Katie is viewed as a leader and has the respect of her classmates; her collaborative work in small groups in Professional Responsibility was lauded by the other students. In short, Katie possesses all of the qualities desirable in a judicial clerk. She has my highest recommendation.

If you have any questions at all about her candidacy, please feel free to contact me by phone or email.

Sincerely yours,

Sarah C. Haan
Professor of Law

Sarah Haan - haans@wlu.edu

A Critique of Indeterminate Sentencing: How Unstructured Indeterminate Sentencing Fails to Accomplish Penal Objectives and Results in Unjust Sentences

Katie Pauly*

This paper argues that indeterminate sentencing, in its unstructured form, is unjust. Section I explains what indeterminate sentencing is, in both its structured and unstructured form. Section II examines Colorado state law and its application of unstructured indeterminate sentencing to sexual offenses. Section III considers three traditional justifications of punishment--deterrence, retribution, and rehabilitation--and the background and applicability of each today. Section IV concludes that from the perspective of Kantian and consequentialist theories of punishment, indeterminate sentencing, in the unstructured form, undermines, rather than achieves, the objectives of punishment.

* Student, Washington and Lee University School of Law, Jurisprudence Seminar, Fall 2020

I. Understanding Indeterminate Sentencing in its Structured and Unstructured Form

A. Indeterminate Sentencing: Definition, Background, and Prominence Today

Indeterminate sentencing is generally defined as a "continuum of devices designed to tailor punishment… to the rehabilitative needs and special dangers of the particular criminal."[1] Rather than determining the exact amount of time that an individual will serve, a judge imposes a minimum and a maximum sentence, and a parole board determines how long the individual actually serves.[2] Indeterminate sentencing places the responsibility on the parole board and on the individual themselves to determine their sentence.[3] As prison reform advocate, Charles Warner, described, the "convict is given the key to the house in which he is confined."[4] Meaning, the convict is theoretically given the opportunity to return to society after proving to the parole board that their behavior warrants release.[5]

Indeterminate sentencing origins are "generally traced to the last third of the nineteenth century,"[6] although the concept of indeterminacy can be traced back centuries.[7] Phrased as a "focus on the individual," indeterminate sentencing developed from the theoretical basis that criminals could be rehabilitated to become functioning, safe, and productive members of society.[8] As early as 1899, Warner explained indeterminate sentencing as a mechanism focused on the individual because no "specific time can be predicted in which a man by discipline can be expected to lay

[1] Alan M. Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 298 (1974).
[2] *Id.* at 299.
[3] Charles Dudley Warner, *Some Aspects of the Indeterminate Sentence*, 8 Yale L.J. 219, 222 (1899).
[4] *Id.* at 223.
[5] *Id.*
[6] *See* Dershowitz, *supra* note 1, at 304–05.
[7] *Id.*
[8] Michael Tonry, *Sentencing and Corrections Issues for the 21st Century*, 2 D.O.J. 1, 3 (Sept. 1999).

aside his bad habits and put on good habits."[9] Focusing on the rehabilitative effects of law and punishment, the 1950 Model Penal Code steered away from "imposing deserved punishment"[10] to instead focus on "correction and rehabilitation"[11] through an implementation of an indeterminate sentencing system.[12] Scholars began focusing on the "psychological explanations of criminality"[13] by implementing "individualized sentencing and corrections policies."[14] As stated by Alan Dershowitz, indeterminate sentencing was viewed not "merely a 'special' sentencing procedure,"[15] rather, "in its many variations, it is the dominant mechanism of involuntary confinement currently employed in the United States."[16]

By the mid-late 1970s, however, attitudes towards indeterminate sentencing shifted.[17] Instead of the positive effects promised to be realized through the more individualized form of punishment, this form of sentencing was criticized by scholars, prisoners, and activists alike for promoting a system that had "broad discretion,"[18] which "produced arbitrary and capricious decisions."[19] Rather than appreciating the "key"[20] Warner described, prisoners purported to dislike the prospect of waiting to see how long they would likely be imprisoned.[21] Additionally, studies emerged casting doubt on the effectiveness of rehabilitating prisoners, making indeterminate

[9] *See* Warner, *supra* note 3, at 221.
[10] *See* Tonry, *supra* note 8, at 4.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *See* Dershowitz, *supra* note 1, at 300–01.
[16] *Id.*
[17] *See* Tonry, *supra* note 8, at 4.
[18] *Id.* at 5.
[19] *Id.*
[20] *See* Warner, *supra* note 3, at 223.
[21] *See* Tonry, *supra* note 8, at 5.

sentences seem arbitrary and arduous rather than effective and practicable.[22] With this controversy, many expected indeterminate sentencing to be replaced by a system of determinate sentencing.[23]

Rather than reverting back to purely determinate sentencing, however, as recently as 2015, 33 states still operated a primarily indeterminate sentencing system, while many others continued using indeterminate sentencing as a sentencing option.[24] What is the reason for this adherence to a system called into question by so many? In large part, the indeterminate sentencing regime has remained prominent due to its focus on the individual and the belief in the rehabilitative effects that time served, when served with a focus on treatment, can have.[25]

B. Unstructured Indeterminate Sentencing

For the purposes of this paper, indeterminate sentencing, as aforementioned, will be referred to as structured indeterminate sentencing. To reiterate, structured indeterminate sentencing describes a set minimum and a set maximum that follow either statutory guidelines or precedent.[26] The time period is set in a term of years with a possibility of early release.[27] Structured indeterminate sentencing describes the indeterminate sentencing regime that courts are most familiar with and implement frequently.[28] It includes the classic examples of release for good behavior, release on parole, etc.[29] Structured indeterminate sentencing has survived because of the appeal of incentivizing criminals to reform in order to be released early.[30]

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[22] *Id.* at 5.
[23] *Id.* at 6.
[24] Alison Lawrence, *Making Sense of Sentencing State Systems and Policies*, NCSL 1, 4 (June 2015), https://www.ncsl.org/documents/cj/sentencing.pdf.
[25] *See* Tonry, *supra* note 8, at 6.
[26] *See* Dershowitz, *supra* note 1, at 298–99.
[27] *Id.*
[28] *See* Tonry, *supra* note 8, at 6.
[29] *See* Dershowitz, *supra* note 1, at 298–99.
[30] *See* Tonry, *supra* note 8, at 4.

Contrasting with structured indeterminate sentencing is unstructured indeterminate sentencing, a term that, for the purpose of this paper, describes the phenomenon of incarceration with a maximum that is not set in a term of years, but rather is set by the vague obscurity of "natural life."[31] Unstructured indeterminate sentencing describes a situation in which an individual is sentenced from a set minimum to an ambiguous maximum.[32] It is "entirely indeterminate"[33] in that it provides no basis of knowledge as to the maximum years spent, other than upon the death of the prisoner.[34] Unstructured indeterminate sentencing is far less common than structured indeterminate sentencing mainly due to its drastic consequences: an inmate may face life in prison. However, certain states, like Colorado, have implemented unstructured indeterminate sentencing for particular sexual offenses.[35]

II. Colorado State Law and Unstructured Indeterminate Sentencing for Sex Offenders

In 1998, the Colorado legislature passed the Lifetime Supervision of Sex Offenders Act.[36] The Act, predicated on the notion that sexual offenders could be rehabilitated, mandated unstructured indeterminate sentences for offenders guilty of particularly egregious sexual offenses.[37] The 1998 Act provides: "The general assembly hereby finds that the majority of persons who commit sex offenses, if incarcerated or supervised without treatment, will continue to present a danger to the public when released from incarceration and supervision."[38] As a response, "the general assembly therefore declare[d] that a program under which sex offenders may receive treatment and supervision for the rest of their lives, if necessary, is necessary for the safety, health,

[31] *See* Dershowitz, *supra* note 1, at 298.
[32] *Id.*
[33] *Id.* at 298–99.
[34] *Id.*
[35] Colorado v. Oglethorpe, 87 P.3d 129 (Colo. App. Ct. 2003).
[36] *Id.*
[37] *Id.*
[38] *Id.*

and welfare of the state."[39] As a condition of release from incarceration, inmates must complete the "minimum period of incarceration specified in a sex offender's indeterminate sentence,"[40] and then, the "parole board shall schedule a hearing to determine whether the sex offender may be released on parole."[41] Therefore, once an individual is sentenced to an unstructured indeterminate sentence, they must wait to enter into a treatment program, complete it to the satisfaction of the parole board, wait to face the parole board, and then wait to hear whether they are to be released back into society.[42] The severity of this system is clear from the legislative intent stated in *Vensor v. Colorado*.[43] The court stated that "[i]n light of the Act's title, its separate declaration of legislative purpose, and the entirety of its provisions, read as a whole, there can be little doubt that the language of section 18-1.3-1004(1)(a) mandates an indeterminate sentence with an upper or maximum term of the sex offender's natural life."[44]

Every year the Colorado Department of Corrections (CDOC), Colorado Department of Public Safety, and State Judicial Department publish "The Lifetime Supervision of Sex Offenders Annual Report."[45] This report details the effects of the Lifetime Supervision Act of 1998 by highlighting rates of recidivism, rehabilitation, successful completion of rehabilitation, inmate population size, etc.[46] Importantly here, the report showcases the lengthy and convoluted process of completing sex offender rehabilitation: in order to be eligible for parole, a lifetime supervision offender must complete a treatment program.[47] In order to be eligible for the program, the

[39] *Id.*
[40] C.R.S.A. § 18-1.3-1006.
[41] *Id.*
[42] *Id.*
[43] Vensor v. Colorado, 151 P.3d 1274, 1274 (Colo. 2007); *see also* Colorado v. Oglethorpe, 87 P.3d 129 (Colo. App. Ct. 2003) (stating that the 1998 Act did not violate the defendant's due process rights).
[44] *Id.* at 1277.
[45] Lifetime Supervision of Sex Offenders Annual Report, Colo. Dept. of Corr. and Colo. Dept. of Pub. Safety (Nov. 2019), https://cdpsdocs.state.co.us/dvomb/SOMB/Lifetime19.pdf.
[46] *Id.* at 2.
[47] *Id.* at 14.

individual must have four years or less to parole eligibility, must be willing to participate in the parole program, and must agree to comply with all of the treatment programs.[48] Once the inmate is deemed eligible, has been interviewed and screened, and potentially re-interviewed and re-screened if failing to pass the first time, the inmate is placed on the global referral list.[49] Once on the global referral list, the individual waits for a spot to open in the treatment program.[50] After securing a spot, the individual then participates in the program, and only upon successful completion of the program will the inmate *potentially* be eligible for release.[51]

A recent Colorado district court case, *Tillery v. Raemisch*, addressed the realities of this system.[52] In *Tillery* the plaintiff brought a civil action against the Executive Director of the CDOC as well as others. Tillery claimed that the CDOC "deprived Plaintiff of treatment and that as a result, Plaintiff is effectively ineligible for parole and will "languish in prison indefinitely."[53] The court dismissed both the Plaintiff's and Defendants' motions for summary judgment, and the case was set for a Final Trial in February of 2019.[54] Since that time, the parties filed a joint stipulation to dismiss with prejudice, and the judge granted the motion.[55] Importantly for the purposes of this paper, the District Judge, Judge William J. Martínez, issued an order specifically referencing the state of the CDOC and Lifetime Supervision Act:

> That report raised the concern of "offenders with lifetime supervision sentences remaining in prison indefinitely ... because they cannot be released until they are treated." (ECF No. 74 ¶ 16; ECF No. 74-6 at 120–21.) The audit stated that at the current rate of enrollment, it would take over eight years to enroll all offenders currently awaiting treatment. (ECF No. 74-6 at 120.) It also cited "a risk that

[48] *Id.*
[49] *Id.*
[50] Lifetime Supervision of Sex Offenders Annual Report, Colo. Dept. of Corr. and Colo. Dept. of Pub. Safety (Nov. 2019), https://cdpsdocs.state.co.us/dvomb/SOMB/Lifetime19.pdf.
[51] *Id.*
[52] Tillery v. Raemisch, No. 16-cv-0282-WJM-STV, 2018 WL -4777411 (D. Colo. Oct. 3, 2018).
[53] *Id.* at 1.
[54] *Id.*
[55] *Id.*

> some offenders may have to wait much longer if newly referred offenders are prioritized before those offenders."[56] As of June 30, 2017, over 1,400 sex offenders were awaiting treatment.[57]

The system overall has faced major criticism.[58] From pushback on the amount of time it takes to meet the parole board,[59] to exceedingly low rates of release back into society,[60] the state's system is called into question, and rightly so.[61] Not only does the system get called into question, but the report itself leaves glaring questions left unanswered, such as, why are there disparities in the number of inmates successfully completing the program vs. the number released?[62] Or, why are rates for release so low for a program supposedly dedicated to the "rehabilitative possibilities" for offenders?[63] Indeterminate sentencing's roots trace back to the fundamental idea that individuals can be rehabilitated, and in the words of Charles Warner, that effort necessitates a prison environment and experience where successful rehabilitation can occur.[64] If individuals are unable to receive placement into the treatment program,[65] never have the opportunity to successfully complete the program, or are denied re-entry into the program,[66] what then is the theoretical purpose behind unstructured indeterminate sentencing?

III. Three Theoretical Justifications of Punishment

[56] *Id.* at 2.
[57] *Id.* at 3.
[58] Allen v. Clements, 930 F. Supp. 2d 1252, 1252 (D. Colo. 2013) (determining that termination of an inmate's treatment was not a violation of due process, and denial of re-enrollment requests did not implicate inmates' liberty interests).
[59] *Id.*
[60] Lifetime Supervision of Sex Offenders Annual Report, Colo. Dept. of Corr. and Colo. Dept. of Pub. Safety (Nov. 2019), https://cdpsdocs.state.co.us/dvomb/SOMB/Lifetime19.pdf.
[61] *Id.*
[62] *Id.* (showing that in 2019, of the 460 offenders participating in treatment, 128 met the statutory criteria for successful progress in the treatment, but only 53 were released).
[63] *Id.* (showing that in 2019, of the 1,759 offenders incarcerated, 1,116 were not eligible to be placed on the list, 460 participated in treatment, and only 3% were released).
[64] *See* Warner, *supra* note 3, at 223.
[65] Allen, 930 F. Supp. 2d at 1252.
[66] *Id.*

In order to understand the unfulfilled theoretical purpose of unstructured indeterminate sentencing, the following section provides an overview of three theoretical justifications for punishment.

A. Deterrence

The deterrence justification stems from "making the law and its corresponding punishments known to the public, so people would be educated about the consequences of their behavior"[67] and avoid socially undesirable behavior, such as crime. Specific deterrence functions to deter individuals who are caught committing crimes from committing them again while general deterrence dissuades the general public from committing crimes by showing the consequences faced by others who have committed the same crime.[68] Both deterrence justifications of punishment are critiqued for two main reasons. First, scholars argue that in large part, U.S. imprisonment rates are increasing due to "deterrence-focused legislation"[69] because it focuses on heightened punishments being "touted as a deterrent"[70] to repeat offenders.[71] Yet "after much empirical testing, researchers have found no significant deterrent effects for such laws,"[72] and instead they have found that more severe punishment is often not a deterrent.[73] A second critique of deterrence-based punishment is that it often ignores many relevant factors that contribute to the perpetration of criminal conduct.[74] Scholars note that factors such as an individual's socioeconomic background, character traits, and "many other factors that have been correlated with criminal conduct, such as age, gender, impulsivity, mental illness, antisocial personality

[67] Kelli D. Tomlinson, *An Examination of Deterrence Theory: Where Do We Stand?* 80 DEC Fed. Prob. 33, 33 (2016).
[68] *Id.*
[69] *Id.* at 34.
[70] *Id.*
[71] *Id.*
[72] *See* Tomlinson, *supra* note 67, at 34.
[73] *Id.*
[74] *Id.*

disorder, etc." are all to be considered.[75] Scholars argue that failure to consider these other factors, beyond just the fear of extended incarceration, minimizes the effectiveness of deterrence-based punishment.[76] Critics argue that only by combining deterrence with other methods of punishment focusing more on the individual's background can deterrence-based punishment be an adequate way to address crime.[77] Despite its shortcomings, it is still regarded as a legitimate justification for punishment.[78]

B. Retribution

Retribution is commonly thought of as the eye for an eye justification of punishment: "Under this theory, offenders should be punished in proportion to their blameworthiness (or desert) in committing the crime being sentenced."[79] Under this framework, if an individual commits a crime, they deserve a punishment that fits the crime committed, and they should serve no more and no less time for that crime.[80] Additionally, retribution focuses on uniformity in sentencing.[81] A crime committed by one individual should have the same punishment as the same crime committed by another individual barring any difference in intent.[82] Intent matters because "deliberate wrongdoing is more culpable than criminal negligence."[83] Further, retribution focuses on a balancing act, or a sliding scale.[84] Justice is not intended to favor one side over the other, rather it is to restore the moral status quo before the crime was committed.[85] As the rehabilitative

[75] *Id.*
[76] *Id.*
[77] *See* Tomlinson, *supra* note 67, at 37.
[78] Katelyn Carr, *An Argument Against Using General Deterrence as a Factor in Criminal Sentencing*, 44 CUMB. L. REV. 249, 252 (2014).
[79] Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 74 (2005).
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] Thomas E. Robins, *Retribution, The Evolving Standard of Decency, and Methods of Education: The Inevitable Collision in Eighth Amendment Jurisprudence*, 119 PENN ST. L. REV. 885, 890 (2015).
[85] *Id.*

theory fell out of favor, a retributive ideal returned, and scholars once again returned to emphasizing proportional punishment for crimes committed.[86]

C. Rehabilitation

As explained earlier, the rehabilitative justification of punishment gained swift momentum in the twentieth century as scholars came to believe judicial fairness required courts to view the criminal as an individual, and accordingly, punish them with individual goals of rehabilitation in mind.[87] Rehabilitation fell out of favor, however, as studies called into question the reality and probability of actually "rehabbing" criminals.[88] Additionally, as prisons failed to conform to standards that would actually promote rehabilitation, theorists questioned whether it was truly possible to rehabilitate a prisoner in the current environment of the prison system and whether the system needed to be changed.[89] Criticized for its ineffectiveness, lack of uniformity, and naivety, it has been regarded as "more of a side consideration to other, more 'weighty' purposes of punishment such as retribution and deterrence."[90]

IV. Unstructured Indeterminate Sentencing Undermines the Objectives of Punishment

Unstructured indeterminate sentencing fails to deter criminals from committing particular crimes for two reasons. First, as previously mentioned, the severity of the punishment, after a certain extent, has been proven to not act as a deterrent.[91] Therefore, individuals are not more effectively deterred by the prospect of life in prison any more than they would be by a maximum structured term of years.[92] Second, deterrence depends on the notion that an individual will be

[86] *See* Tonry, *supra* note 8, at 4.
[87] *Id.* at 5.
[88] Chad Flanders, *The Supreme Court and the Rehabilitative Deal,* 49 GA. L. REV. 383, 388 (2015).
[89] *See* Warner, *supra* note 3, at 223.
[90] *Id.*
[91] *See* Tomlinson, *supra* note 67, at 34.
[92] *Id.* Tomlinson references a 1990 study conducted by Schneider & Ervins that "showed that people who had been punished more severely actually engaged in more crime; this could be due to the punishment creating a chain

deterred from a crime simply by noting the consequences of the crime.[93] Yet with sexual offenses in particular, noting the consequences of a crime is not always enough to deter an offender.[94] Beyond the additional factors previously listed, sexual offenders are often motivated by factors that cannot be deterred based solely on an explanation of the punishment.[95] Sexual offenders often share "(a) deviant sexual interests and (b) antisocial orientation/lifestyle instability."[96] With factors such as these to consider in why an individual commits a sexual offense, coupled with the fact that individuals are not necessarily less likely to commit a crime when the length of imprisonment is greater, unstructured indeterminate sentencing fails to effectively deter criminals.

Under the retributive justification, unstructured indeterminate sentencing is inappropriate. Retributionists strive to punish individuals for the crime that they committed because of the individual's culpability at the time that they committed the crime.[97] Importantly, unstructured indeterminate sentencing removes proportionality, a fundamental component of retributive punishment.[98] In fact, when defendants question the constitutionality of the Act of 1998, they often argue that the Act is effectively cruel and unusual punishment due to the severity as well as the lack of proportionality.[99] As the court in *Colorado v. Oglethorpe* stated, strict proportionality is not required.[100] The court stated the "constitutional prohibition against cruel and unusual punishment does not require strict proportionality between the crimes committed and the sentence

reaction of other events which reduce individuals' opportunities for conventional behavior… and weakening of social bonds."
[93] *Id.* at 35.
[94] K. Hanson & K. Morton-Bourgon, *The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies*, 73 J. CONSULTING & CLINICAL PSYCHOL. 1154, 1154 (2005).
[95] *Id.*
[96] *Id.*
[97] *See* Frase, *supra* note 79, at 74.
[98] *Id.*
[99] Oglethorpe, 87 P.3d 129, at 136.
[100] *Id.*

imposed."[101] Unstructured indeterminate sentencing also removes 'just desert' or eye for an eye punishment. The principal reason for retribution is to return, as nearly as possible, to the moral status quo before the crime was committed.[102] If sentences vary so drastically that a prisoner may be incarcerated up until their natural death, the punishment does not allow for return to the status quo and, therefore, does not meet the goals of retribution.

As seen through an exploration of Colorado's sentencing structure, unstructured indeterminate sentencing fails to meet the rehabilitative justification for punishment. Unstructured indeterminate sentencing was purportedly created to accomplish rehabilitative objectives.[103] The reasoning was as follows: punish individuals for a mandatory minimum, and then once the individual had gone through treatment and had been rehabilitated so that they are safe for society, release them back into society and do not continue to punish them, but continue to observe them while they are on parole.[104] Some scientists argue that sexual offenders cannot be rehabilitated, while others argue that with proper treatment and supervision, sexual offenders can be safely reintroduced to society.[105] Because sexual offenses are thought to be committed because of psychological or physiological reasons rather than because of institutional or demographical reasons, scientists have struggled to determine whether they can or cannot be successfully rehabilitated.[106]

Ironically, whether a sex offender can or cannot be rehabilitated, the Colorado rehabilitative unstructured indeterminate sentencing scheme still fails. If sex offenders *cannot* be rehabilitated, it fails because the entire program has been predicated on the idea that a sex offender

[101] *Id.*
[102] *See* Robins, *supra* note 84, at 890.
[103] *See* Tonry, *supra* note 8, at 5.
[104] *See* Flanders, *supra* note 88, at 388.
[105] *See* K. Hanson & K. Morton-Bourgon, *supra* note 94, at 1154.
[106] *Id.*

is susceptible to rehabilitation.[107] If sex offenders *can* be rehabilitated, the unstructured indeterminate sentencing scheme still fails because the programs in place are so inadequate that rehabilitation becomes a lofty goal rather than a tangible actuality. The whole notion of unstructured indeterminate sentencing *must* be predicated on the belief that sexual offenders can be rehabilitated and introduced back into society, otherwise, no sexual offender would ever have a chance at release under this system. If rehabilitation is the premise supporting unstructured indeterminate sentencing, however, there must be a system in place that allows for the opportunity for successful rehabilitation and reintroduction into society. Otherwise, the system has failed from the start, and ultimately, if a competent and successful rehabilitation program is not in place, the end result for sexual offenders in an unstructured indeterminate sentencing system would be the same as if the system believed that offenders could not be rehabilitated and were therefore confined for life. If the justification for unstructured indeterminate sentencing is the promise of the ability to rehabilitate sex offenders, then the system demands and depends upon realistic opportunities for rehabilitation in a program built to ensure that offenders are given "the key"[108] to create their own success. Otherwise, the state should call it what it is: lifetime confinement.

Beyond just undermining the theoretical justifications for punishment, unstructured indeterminate sentencing corrupts the sentencing procedure, causing unjust results for victims. Because of the maximum term of life, judges have very little, if almost no discretion to change the high end of the unstructured indeterminate sentence.[109] The result? Cases like a 2016 Colorado rape case.[110] A young woman was raped while unconscious, and the rapist, Austin Wilkerson, was

[107] C.R.S.A. § 18-1.3-1001.
[108] *See* Warner, *supra* note 3, at 221.
[109] Vensor v. Colorado, 151 P.3d 1274, 1274 (Colo. 2007).
[110] Sam Levin, *No Prison for Colorado College Student Who 'Raped a Helpless Young Woman'* (Aug. 10, 2016), https://www.theguardian.com/us-news/2016/aug/10/university-of-colorado-sexual-assault-austin-wilkerson.

sentenced to "work release" and 20 years to life on probation.[111] Similar to the Brock Turner case,[112] this case caused an outcry in the community as yet another sex offender, especially a young, white, college-aged sex offender, avoided prison.[113] The reasoning in this case highlights the problematic results of unstructured indeterminate sentencing.[114] If the judge were to have pursued the prison sentence, Wilkerson may have faced life in prison.[115] As stated in an article focused on the rape case's relation to indeterminate sentencing law, "judges are in a no-win situation."[116] Ultimately, the judge has to decide whether the person deserves probation or the possibility of life in prison.[117] It is a drastic difference in result, and it incentivizes judges to offer probation for cases purely because they do not believe the case merits life in prison, not because they believe the defendant's conduct does not merit prison time.[118]

In conclusion, whether a sex offender can or cannot be rehabilitated, and whether or not the system was created as a guise to further lifetime confinement of sex offenders, sex offenders are not the only ones who are suffering. Victims suffer, and no objective of punishment, whether deterrence, retribution, or rehabilitation, is met.

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[111] *Id.*
[112] People v. Turner, No. H043709, 2018 WL -3751731 (Cal. Ct. App. Aug. 8, 2018).
[113] Jaclyn Allen, *CU Rape Case Sparks Debate Over Colorado's Indeterminate Sentencing Law* (Aug. 16, 2016), https://www.thedenverchannel.com/news/local-news/colorados-indeterminate-sentencing-criticized.
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*

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Date of JD/LLB	**June 4, 2022**
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Journal(s)	**Legal Forum**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Hinton Moot Court**

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5/29/2021

The Honorable Elizabeth W. Hanes
United States District Court for the Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Magistrate Judge Hanes:

I am a second-year law student at the University of Chicago, and I am applying for the clerkship position in your chambers for the 2022 term.

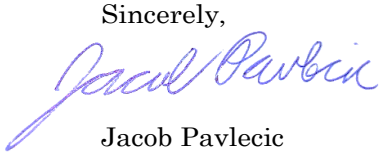
My favorite part about studying philosophy in college was trying to craft general theories that could explain or justify a variety of different situations. This is why I love the law; I am always fascinated to learn about how the law itself, as well as the interpretative tools we use to analyze it, are shaped to achieve the best results on a consistent basis. Furthering this fascination is why I want to clerk, and I hope to bring my passion of the law to your chambers.

My experiences in law school will enable me to efficiently and effectively complete projects in your chambers, even if the topics are obscure. As a research assistant for Professor Nou, I had to find real-world ramifications of a novel topic in administrative law: regulatory diffusion. I was also able to find relevant caselaw on this subject which had been overlooked by past research assistants.

I also have experience working quickly. In my Constitutional Decisionmaking class, I teamed up with four other classmates to produce two mock-judicial opinions per week. We only had a short time to agree on a consensus framework for each case; when we could not, we had to swiftly issue dissenting or concurring opinions expressing our concerns. This class was in addition to my responsibilities as a member of Chicago's topical Law Journal, the *Legal Forum*, which included finishing my Comment and giving feedback on my fellow staffers' Comments. Due in part to the feedback I gave, I was selected to be a Comment Editor for the next edition of the *Legal Forum*.

My resume, transcript, and writing sample are enclosed. Letters of recommendation from Professors Jennifer Nou and Omri Ben-Shahar will arrive under separate cover. Should you require additional information, please do not hesitate to let me know. Thank you for your time.

Sincerely,



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- *Activities*: Hinton Moot Court, Participant; Student Admissions Committee, Member

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Bachelor of Arts in Politics and Philosophy, May 2018
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- *Activities*: Pitt Political Review, Managing Editor; Pitt Mock Trial, Member

Experience

City of Chicago, Law Department (Appeals Division), Chicago, IL
Summer Intern, June 2021 – Aug 2021

Professor Jennifer Nou, Chicago, IL
Research Assistant, June 2020 – Present
- Conducting a literature review on the intersection of election law and administrative law
- Researched comments on and implications of regulatory diffusion in the United States

The University of Chicago Law School, D'Angelo Law Library, Chicago, IL
Research Program Participant, July 2020 – Aug 2020
- Applied advanced legal research strategies to analyze certain tax implications of the CARES Act
- Effectively summarized the tax incentives offered by the CARES Act for a nonlawyer audience

USA Hockey, Pittsburgh, PA
USA Hockey Official, Oct 2012 – Present
- Moderate tense situations involving players, coaches, and parents
- Create safe and fair environment for all players
- Maintain awareness at all times and prepare for potentially dangerous situations

Betsy for PA Campaign (LD – 30), Gibsonia, PA
Field Director, July 2018 – Nov 2018
- Recruited and managed a network of 50+ volunteers
- Scheduled weekly canvasses and phone banks in collaboration with other campaigns
- Developed campaign strategy to determine where to devote resources to maximize vote share

Democratic Primary Candidate for LD – 30, Gibsonia, PA
Candidate for Pennsylvania State House, Jan 2018 – May 2018
- Formed and filed all reports for Campaign Committee
- Developed website and social media pages for the Campaign
- Organized volunteers and obtained 400+ ballot petition signatures within three weeks
- Secured the endorsement of the Allegheny County Democratic Committee

Hobbies and Interests

- National Eagle Scout Association: Member
- Richland Township Democratic Committee Member
- Proficient in French; Beginner in Japanese

THE UNIVERSITY OF CHICAGO

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Student ID: 12249968

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2019
Current Status: Active in Program
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EP or EF (Emergency Pass/Emergency Fail) grades are awarded in response to a global health emergency beginning in March of 2020 that resulted in school-wide changes to instruction and/or academic policies.

Beginning of Law School Record

Autumn 2019

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law William Baude	3	3	179
LAWS	30211	Civil Procedure I Emily Buss	3	3	178
LAWS	30311	Criminal Law Genevieve Lakier	3	3	179
LAWS	30611	Torts Saul Levmore	3	3	177
LAWS	30711	Legal Research and Writing Cree Jones Patrick Barry	1	1	178

Winter 2020

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law Richard Mcadams	3	3	179
LAWS	30411	Property Lior Strahilevitz	3	3	EP
LAWS	30511	Contracts Omri Ben-Shahar	3	3	EP
LAWS	30611	Torts Saul Levmore	3	3	177
LAWS	30711	Legal Research and Writing Cree Jones Patrick Barry	1	1	178

Spring 2020

Course		Description	Attempted	Earned	Grade
LAWS	30221	Civil Procedure II William Hubbard	3	3	EP
LAWS	30411	Property Lior Strahilevitz	3	3	EP
LAWS	30511	Contracts Douglas Baird	3	3	EP
LAWS	30712	Lawyering: Brief Writing, Oral Advocacy and Transactional Skills Cree Jones	2	2	EP
LAWS	47411	Jurisprudence I: Theories of Law and Adjudication Brian Leiter	3	3	EP

Summer 2020

Honors/Awards
The University of Chicago Legal Forum, Staff Member 2020-21

Autumn 2020

Course		Description	Attempted	Earned	Grade
LAWS	40201	Constitutional Law II: Freedom of Speech Genevieve Lakier	3	3	177
LAWS	43284	Professional Responsibility and the Legal Profession Anna-Maria Marshall	3	3	176
LAWS	50311	U.S. Supreme Court: Theory and Practice	3	3	178
Req Designation:		Meets Writing Project Requirement Sarah Konsky Michael Scodro			
LAWS	53498	Presence: Performance Skills for Lawyers Paul Marchegiani	2	2	179
LAWS	61512	Workshop: Law and Philosophy Brian Leiter Matthew Etchemendy	1	0	
LAWS	94120	The University of Chicago Legal Forum Anthony Casey	1	1	P

Winter 2021

Course		Description	Attempted	Earned	Grade
LAWS	40101	Constitutional Law I: Governmental Structure William Baude	3	3	177
LAWS	41601	Evidence Emily Buss	3	3	177
LAWS	46101	Administrative Law Jennifer Nou	3	3	177
LAWS	50202	Constitutional Decisionmaking	3	3	179
Req Designation:		Meets Substantial Research Paper Requirement Geoffrey Stone			
LAWS	61512	Workshop: Law and Philosophy Brian Leiter Matthew Etchemendy	1	0	
LAWS	94120	The University of Chicago Legal Forum Anthony Casey	1	1	P

Date Issued: 06/06/2021

THE UNIVERSITY OF CHICAGO

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University of Chicago Law School

Spring 2021

Course		Description	Attempted	Earned	Grade
LAWS	43253	Financial Regulation Law Eric Posner	3	3	182
LAWS	46001	Environmental Law: Air, Water, and Animals Hajin Kim	3	3	178
LAWS	53497	Editing and Advocacy Patrick Barry	2	2	P
LAWS	61512	Workshop: Law and Philosophy Brian Leiter Matthew Etchemendy	1	0	
LAWS	94120	The University of Chicago Legal Forum Anthony Casey	1	1	P

End of University of Chicago Law School

OFFICIAL ACADEMIC DOCUMENT

THE UNIVERSITY OF CHICAGO

Key to Transcripts of Academic Records

1. Accreditation: The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit http://oir.uchicago.edu/policies/disclosures.

2. Calendar & Status: The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

3. Course Information: Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. Credits: The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

I	**Incomplete:** Not yet submitted all evidence for final grade. When the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB).
IP	**Pass** (non-Law): Mark of I changed to P (Pass). See 8 for Law IP notation.
NGR	**No Grade Reported:** No final grade submitted
P	**Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
Q	**Query:** No final grade submitted (College only)
R	**Registered:** Registered to audit the course
S	**Satisfactory**
U	**Unsatisfactory**
UW	**Unofficial Withdrawal**
W	**Withdrawal:** Does not affect GPA calculation
WP	**Withdrawal Passing:** Does not affect GPA calculation
WF	**Withdrawal Failing:** Does not affect GPA calculation
	Blank: If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

H	Honors Quality
P*	High Pass
P	Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: http://registrar.uchicago.edu.

6. Academic Status and Program of Study: The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

7. Doctoral Residence Status: Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled Pro Forma does not extend the maximum year limit on registration.

8. Law School Transcript Key: The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)/(pre-2002 180+)
7.2%
Honors (179+)/(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

9. FERPA Re-Disclosure Notice: In accordance with U.S.C. 438(6)(4)(B)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar
University of Chicago
1427 E. 60th Street
Chicago, IL 60637
773.702.7891

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http://registrar.uchicago.edu.

Revised 09/2016

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May 06, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Jacob Pavlecic

Dear Judge Hanes:

It gives me a pleasure to write this letter in support of Mr. Jacob Pavlecic clerkship application. He is a strong candidate, a smart student with good judgment and work ethic. He is a responsible and reliable person, with humility and dedication. I think he is a very attractive candidate for a federal clerkship.

To be entirely honest, it is hard to look you in the eye and say all those great things about a student whom I have known only through a large 1L course, particularly at a time in which out-of-class meetings were largely impossible. It is not my style to err on the side of superlative or to paste into my letter boilerplate praises, just for the purpose of selling you a candidate. So my letter is short and a bit thin in detail. But I am quite confident about my intuition, and I agreed to write a recommendation letter for Mr. Pavlecic based on that intuition.

The main fact that stands out in my mind is Mr. Pavlecic's performance in the 1L Contracts course that took place during the early Covid lockdown and was subject to the mandatory Pass/Fail grading scale. The quality of the exams many of the students in that class wrote was mediocre, far below the standard of years past. Admittedly, many students had to endure difficult emotional and other pressures, but it was nevertheless disappointing to see the dramatic effect that the absence of grade incentive had on the overall performance in the class. And yet, some students (not many) did rise to the challenge and demonstrated through their intense preparation and exceptionally written exams sides of their intellect and character that go beyond the quantitative grade achievements. They did not know or expect that I will keep records of their performance—my own private notes and "shadow grades"—and it is on the basis of this private information that I base the present letter. Jacob Pavlecic represents one of the best among this small group of self-motivated students, who worked hard and performed well without anticipating any reward. His exam was exceptionally good, strong in every part. Not only does he know Contract, I also regard his performance as a signal of integrity and motivation.

In the few conversations I had with Mr. Pavlecic, I noted further evidence for this quality – his quiet and self-motivated character. He is the anti-thesis to the strategic, self-promoting type. My experience suggests that this understated character of his fronts a rich and lively intellect.

I will be glad to provide additional information and to chat further about Mr. Pavlecic over the phone. I can be reached on the cellphone, at (734) 276-9143.

Sincerely,

Omri Ben-Shahar

Professor Jennifer Nou
Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
jnou@uchicago.edu / 773-834-7658

May 10, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to highly recommend Jacob Pavlecic to you as a law clerk. He is among the finest research assistants with whom I have worked: Jacob is attentive to detail, a quick study and skilled at synthesizing large amounts of information. He is also an excellent communicator and someone who handles deadlines with ease. In short, I believe Jacob will be a superb law clerk.

Jacob has been a research assistant for me since last summer. My primary field of research is administrative law and I had projects that required a fair amount of sophistication. Back then, Jacob had yet to take a course on the subject, so I was unsure of what to expect. To my relief, he mastered the core ideas quickly. Even more impressively, Jacob was entrepreneurial in learning how to navigate various legal sources in order to find obscure regulatory documents such as public comments. Moreover, he even went out of his way to contact agencies in order to find older documents that were not available online. Perhaps needless to say, Jacob is creative with his research sources and does not give up easily. He does not leave a rock unturned.

I also quickly learned that Jacob is an excellent writer. Too often, I have research assistants that dump everything and the kitchen sink into a memo in an effort to show me that they have found information, no matter how irrelevant. These are usually a waste of my time. By contrast, Jacob's memos for me were tightly organized, focused, and well-written. It was clear he had done a huge amount of research, but he only included what was narrowly relevant to my questions. He also cited his findings carefully and meticulously.

Perhaps not surprisingly, Jacob has done well in the classroom. I had the pleasure to have him in my Administrative Law course this winter quarter. His final grade was a 177, at the median of an extremely strong cohort. Jacob came prepared to every class, ready to discuss the material. That said, I do not believe his grades in general reflect the depth of his skills – particularly those that would make him an excellent law clerk. After all, many grades are based on exams written under extreme time-pressure. His law review comment, in my opinion, better reflects some of his research and writing capabilities. In brief, the paper examines the scope of the Administrative Procedure Act's "good cause" exception for agencies to forego public notice and comment in emergency situations. He considers the relevant case law when analyzing the Centers for Disease Control's eviction moratoria. On this basis, he then concludes that the Trump Administration's invocation of "good cause" was illegal. Central to Jacob's analysis was his subtle observation that Congress had explicitly acted with regard to the appropriateness of public comment in the relevant statute. On the whole, the piece displays his ability to work with administrative materials; to analyze the relevant doctrines with care; and then to consider the relevant policy implications.

In the longer run, Jacob is likely to either work in private practice while involved in local politics and government, or else to enter government service directly, perhaps in an administrative agency. He comes from a family in Pittsburgh with a long history of local public service. Before law school, Jacob ran for his state House seat – coming 2nd in the primary by 304 votes out of 5,800 cast. The experience opened his eyes to the dynamics of elected politics and policymaking. As a testament to his commitment to serve his community, he then campaigned vigorously on behalf of the winner in the general election. In his spare time, Jacob volunteers his time as an icy hockey coach and referee. He plans to continue this volunteer work after law school as well.

In short, I believe Jacob will be an excellent law clerk and pleasure to have in chambers. He will also be a dependable and well-liked colleague to his co-clerks. After graduation, I very much expect him to become a leader in the legal community. Please do not hesitate to contact me with any questions. I can be reached at your convenience at jnou@uchicago.edu or at (203) 907-8618.

Best regards,

Jennifer Nou - jnou@uchicago.edu - 773-702-9494

Jennifer Nou
Professor of Law
University of Chicago Law School

Jennifer Nou - jnou@uchicago.edu - 773-702-9494

WRITING SAMPLE FOR JACOB PAVLECIC

The following is a mock-brief in opposition I prepared for my Supreme Court: Theory and Practice class. It opposes a grant of certiorari in the case *Patel v. Facebook, Inc.*, 932 F.3d 1264 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 937 (2020). In the assignment, I was responding to Facebook's actual petition for a writ of certiorari. The only filings available for this assignment were the petition and appendix A of the case. This brief is considered to have been filed on December 2nd, 2019 and so it does not reference any case filed after that date.

This excerpt contains the Statement of the Case as well as part of the argument for denying Facebook's petition. Facebook alleged the decision of the Ninth Circuit created or implicated three circuit splits; the argument in this excerpt addresses the second split named by Facebook.

STATEMENT OF THE CASE

1. As technology continues to develop, private companies have been creating more and more uses for an individual's biometric information. *See* 740 Ill. Comp. Stat. 14/5(a). Biometric information is unique information about a specific person including things like "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." *Id.* 14/10(a)–(b). Given that the "full ramifications of biometric technology are not fully known" and finding that the "[a]n overwhelming majority of members of the public are weary of the use of biometrics when such information is tied to finances and other personal information," *Id.* 14(d), (f), the General Assembly of Illinois saw fit to enact the Biometric Information Privacy Act ("BIPA") in 2008. Pet. App. 8a.

Among its provisions, BIPA requires any private entity that wishes to use the biometric information of consumers to develop a public policy detailing how the entity will handle that information. This includes procedures for destroying the information "when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first." *Id.* 14/15(a). BIPA also requires that, before any private entity may collect or obtain someone's biometric information, the entity must first receive the individual's consent. *Id.* 14/15(b). Consent can only be given if the entity details what information is being collected and how long the information shall be stored and used. *Id.*

2. Petitioner is Facebook, "one of the largest social media platforms in the world." Pet. App. 5a. One of the features of Facebook is that users may upload photographs to Facebook to share them with friends. *Id.* at 29a. In 2010, Facebook launched its "Tag Suggestions" feature to its platform. *Id.* The "Tag Suggestions" feature works by using "state-of-the-art facial recognition technology to extract biometric [information] from photographs that users upload." *Id.* at 30a (quotation omitted). With this process, Facebook creates a template of a

person's face based on "the geometric relationship of facial features unique to each individual, like the distance between a person's eyes, nose and ears." *Id.* (quotation omitted). Whenever a user uploads new photographs to Facebook, it runs an algorithm scanning the faces of the people in the photos to see if any face in the photo matches an existing facial template. *Id.* at 6a. If there is a match, Facebook suggests tagging the person in the photo which would identify the people in the photo by name and create a link to that user's Facebook page. *Id.*

3. Nimesh Patel, Adam Penzen, and Carlo Licta ("Patel et al") are the Respondents before this Court. Each of them is an Illinois resident and user of Facebook. *Id.* at 7a. Patel et al have all uploaded photographs to Facebook on their own profiles. *Id.* In August of 2015, Patel et al filed suit against Facebook in the Northern District of California for acquiring their biometric information, allegedly without their consent. *Id.* In addition, they argued that Facebook has never published a public policy detailing Facebook's biometric retention and destruction practices. *Id.*

In response, Facebook filed a 12(b)(1) motion to dismiss Patel et al's complaint for lack of subject matter jurisdiction. Pet. 12. Specifically, Facebook argued that Patel et al failed to allege a harm sufficient to create in injury in fact for the purposes of Article III standing. *Id.* As it was a motion to dismiss based on the pleadings, the district court "t[ook] all factual allegations in the complaint as true and dr[ew] all reasonable inferences in plaintiffs' favor." Pet. App. 31a.

4. On February 26, 2018, Judge James Donato denied Facebook's motion to dismiss this case. The court found that Facebook's alleged violation of the procedural rights conferred by BIPA amounted to a concrete harm sufficient to establish an injury in fact. *Id.* at 36a. Judge Donato noted that when a company fails to obtain consent before acquiring a person's biometric information, "the right of the individual to maintain her biometric privacy vanishes into thin air. The precise harm the Illinois legislature sought to prevent is then realized." *Id.*

While Facebook also tried to assert that its user agreement and data policy actually create compliance with BIPA, the court noted that those claims must be adjudicated at trial. *Id.* at 40a–41a. The only issue was whether Patel et al had alleged an injury in fact sufficient for standing; the district court found that they had.

5. Facebook then sought review by the Ninth Circuit which affirmed the ruling of Judge Donato. *Id.* at 27a. Applying this Court's, as well as its own precedent, the Ninth Circuit found that certain statutory violations can create a concrete injury without the need for any additional harm. Such statutes must be designed to protect concrete interests "as opposed to purely procedural rights," and "the specific procedural violations . . . [must] actually harm, or present a material risk of harm to, such interests." Pet. App. 13a (internal citation omitted).

The Ninth Circuit found that BIPA was meant to protect the concrete interest of privacy, the invasion of which "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* at 18a (citing *Spokeo v. Robbins*, 136 S. Ct. 1540, 1549 (2016). This was because creating "a face template using facial-recognition technology without consent (as alleged here) invades an individual's private affairs and concrete interests." *Id.* at 19a. The court found that BIPA established a privacy right of an "individual to maintain his or her biometric privacy." *Id.* at 21a (quotation omitted). Next, the Ninth Circuit analyzed whether the specific violations alleged by Patel et al presented an actual or a material risk of harm to Patel et al' privacy interests. BIPA made clear that only with the consent of individuals could private entities use those individuals' biometric information. *Id.* A failure to gain the consent of an individual to use his or her biometric data, therefore, "would necessarily violate the plaintiffs' substantive privacy interests." *Id.* Thus, the Ninth Circuit found Patel et al have suffered an injury in fact.

The Ninth Circuit denied Facebook's motion for a rehearing en banc on October 18, 2019. Pet. 2. Facebook then sought this Court's review in December of 2019.

REASONS FOR DENYING THE PETITION: THE NINTH CIRCUIT'S DECISION DOES NOT IMPLICATE THE MINOR CIRCUIT SPLIT ON THE IMMINENCE REQUIREMENT OF STANDING AND IS NOT GROUNDS FOR FURTHER REVIEW

1. This case does not implicate the second circuit split identified by Facebook. It is true that there is an acknowledged split among the circuits in the cases Facebook cites. Yet, this conflict centers on what is required for a "threatened injury" to be "sufficiently imminent" to establish an injury in fact. *Beck v. McDonald*, 848 F.3d 262, 274 (4th Cir. 2017). Concrete injuries that confer standing can be "actual or imminent." *Clapper v. Amnesty International USA*, 568 U.S. 399, 409 (2013). Unlike the cases comprising this circuit split, in the present case, there is an *actual* harm—not an imminent one. The district court made clear that the procedural violation asserted by Patel et al constituted an "*actual* and concrete harm." Pet. App. 35a. (emphasis added). While the Ninth Circuit did not make explicit its finding on whether the harm was actual or imminent, it stated that when an entity violates the implicated sections of BIPA, "the right of the individual to maintain his or her biometric privacy *vanishes* into thin air." Pet. App. 21a (emphasis added) (internal citation omitted). Using the present tense, the Ninth Circuit is saying that Patel et al have suffered a harm; there is no need to speculate over if a harm may appear in the future. The privacy rights of the Patel et al "vainishe[d] into thin air" when Facebook failed to obtain their consent et al and failed to provide them with a disclosure, thus creating an actual injury.

Facebook erroneously asserts that the Ninth Circuit held the injury suffered by Patel et al is an imminent one, as opposed to actual. Pet. 21–22. To support this conclusion, Facebook selectively quotes a few sentences of the Ninth Circuit's opinion where it discussed some ways that one's biometric information could be misused. *Id. See also* Pet. App. 17a–19a.

However, in that portion of the opinion, the Ninth Circuit was only trying to establish "whether the statutory provisions at issue were established to protect [the plaintiff's] concrete interests (as opposed to purely procedural rights)." *Id.* at 15a. It was not looking at the specific allegations made by Patel et al. Instead, the court was only explaining some interests BIPA was meant to protect. When the court cited to possible harms, it did so in support of the proposition that biometric information was something worthy of protection. *Id.* at 17a. It was only in the next, entirely separate section of the opinion where the court turned to the "the specific procedural violations alleged in this case." *Id.* at 20a (internal citation omitted).

In this next section, the Ninth Circuit described the Patel et al' harms in the present tense. *Id.* at 21a ("Facebook's alleged violation of these statutory requirements would necessarily *violate* the plaintiffs' substantive privacy interests. . . . [W]hen a private entity fails to adhere to the statutory procedures the right of the individual to maintain his or her biometric privacy *vanishes* into thin air." (emphasis added) (internal citation omitted). This shows the Ninth Circuit considered the harm suffered by Patel et al to be an actual harm, not an imminent one. Moreover, for Facebook's argument to be correct, that would mean the Ninth Circuit would have overturned the district court's finding that Patel et al suffered an "actual and concrete harm." Pet. App. 35a. It strains reason to claim that the Ninth Circuit overruled this finding implicitly, in an unrelated portion of the opinion, and in opinion purporting to simply affirm the lower court's decision. The much more plausible scenario is that Ninth Circuit agreed with the district court—the harms suffered by Patel et al were actual and thus this case does not implicate the second circuit split.

2. When one begins to consider the specific cases comprising the circuit split, it becomes even clearer how dissimilar they are to the present issue. While those cases also dealt with privacy concerns, they are not at all similar to the ones here. BIPA is meant to protect a person's biometric information—a core aspect of one's privacy. In the cases

comprising this circuit split, the issue was the potential disclosure of private information to third parties. *In re 21st Century Oncology Customer Data Security Breach Litigation*, 380 F.Supp.3d 1243, 1251 (M.D. Fla. 2019) (discussing the split in-depth). In those cases, the plaintiffs voluntarily gave the defendants the private information that was at issue; they just did not want their information given to third parties. Patel et al did no such thing. They only gave Facebook pictures. Facebook then took those pictures and extracted the biometric data from them; at no point did Patel et al provide Facebook with the specific measurements constituting their facial geometry.

This current dispute is thus based on Facebook taking information from Patel et al in the first instance without their consent. For the cases comprising the circuit split, the harm alleged by the plaintiffs only occurred if their data was shared with a third party. That is why courts categorized their harm as imminent rather than actual because it was not always clear if the third parties had accessed the plaintiff's private data. Here, by contrast, there is no such dispute. Facebook unquestionably took the private information at issue and Patel et al are suing Facebook for its own actions, not the potential actions of some third party.

A final nail in the coffin of the argument that the second circuit split applies to this case is Facebook's inclusion of *Electronic Privacy Information Center v. U.S. Department of Commerce* ("*EPIC*"), 928 F.3d 95 (D.C. Cir. 2019) as one of the cases in the split. Despite coming relatively late in the split, that case makes no mention of any other case comprising the circuit split. Moreover, when other courts talk about this circuit split, they do mention the D.C. Circuit, but not *EPIC*. *See e.g.*, *21st Century*, 380 F. Supp. 3d at 1251 (M.D. Fla. 2019). Instead, courts typically cite to the D.C. Circuit's case *Attias v. Carefirst, Inc.*, 865 F.3d 620 (D.C. Cir. 2017). *See e.g., 21st Century*, 380 F.Supp.3d at 1251. Facebook's attempt to force *EPIC* into the circuit split is understandable; *EPIC*'s inclusion would broaden the applicability of this particular circuit split. However, the truth is that while there is a circuit

split, it is on the very specific issue of "whether an increased risk of identity theft subsequent to a data breach is a cognizable injury in fact." *21st Century*, 380 F.Supp.3d at 1250. *See also* Pet. 22 ("Our sister circuits are divided on whether a plaintiff may establish' standing 'based on an increased risk of future *identity theft*." (quoting *Beck*, 848 F.3d at 273) (emphasis added).

If this were not the case, then *EPIC* would be inconsistent with *Attias*. Facebook itself argues *EPIC* supports the holding that "the possibility that a plaintiff's personal information may be misused does *not* create standing absent an imminent risk of injury." Pet. 7. (emphasis added) Yet in *Attias*, the court held that the "substantial risk of identity theft" does constitute an injury in fact. *Attias*, 865 F.3d at 628–29. This contradicts the Third Circuit (with whom Facebook asserts the D.C. Circuit is in agreement, *see* Pet. 23) which has stated "allegations of an increased risk of identity theft resulting from a security breach are [ ] insufficient to secure standing." *Reilly v. Ceridian Corp.*, 664 F.3d 38, 43 (3d Cir. 2011). The D.C. Circuit did not contradict itself with *EPIC*. Instead, it is far easier and more accurate to distinguish it from *Attias* because *EPIC* did not deal with the risk of identity theft like every other case in the circuit split mentioned by Facebook. Once *EPIC* is swapped for *Attias*, any claim that this circuit split bears on the present case fall apart. This case does not concern potential identity theft; it is about an invasion of privacy that allegedly already occurred.

3. In addition, this circuit split is not even as deep or as remarkable as Facebook tries to make it seem. For example, while the Fourth Circuit in *Beck* recognized the existence of a circuit split, it did not purport to deepen it. *Beck,* 848 F.3d at 273. Rather, it provided one way to read the cases without creating any conflicts. *Id.* at 274. In one set of cases, there was either an intentional data hack and/or one of the named plaintiffs pleaded they had suffered from identity theft stemming from involvement with the defendant. *Id.* Conversely, in the

cases that found a lack of standing, there were no allegations that anyone had suffered any instances of identity theft. *Beck*, 848 F.3d at 274. The only explicit break the Fourth Circuit took with some other circuits was over whether a defendant's offer "to provide free credit monitoring services" to plaintiffs can confer standing in identity theft cases. *Id.* at 276.

Further reconciliation of these cases is provided by Judge Mary S. Scriven who posited "the differing sets of facts involved in each circuit's decision are what appear to have driven the ultimate decision on standing, not necessarily a fundamental disagreement on the law." *21st Century*, 380 F.Supp.3d at 1251. Judge Scriven helpfully provides three factors that explain away most of the division among the circuits. *Id.* at 1251–54. Even if one tries to shoehorn this current case into this circuit split, going over the common factors reveal that this case would not further divide the circuits on this issue.

The first factor courts of appeals look to is the intent of the party that acquires the private information. *Id.* at 1251–52. There is no question that Facebook had the intent to acquire the information at issue in this case; that is the entire point of their algorithm analyzing uploaded photographs. True, they are not a third party accessing the information as in the other cases. Yet, in the other cases, the plaintiffs gave their specific data at issue to the defendants. Facebook, allegedly without the consent of Patel et al, took the data for itself.[1] So, on this factor, the decision below would be in accordance with the other circuits.

Next, courts considered "the type of information compromised." *Id.* at 1253. On the lower end was relatively easy information to change: credit and debit card numbers. *Id.* The circuits are divided on whether information such as credit card numbers can create an injury in fact. Courts are generally more protective of information like Social Security numbers

[1] To be clear, the data Facebook took from Patel et al is their specific facial geometries which Facebook calculated from the photographs submitted by Patel et al. Patel et al do not contend Facebook's use of the photos themselves constitute an invasion of privacy.

which are harder to change. *Id.* Biometric information is even more static in that it cannot be changed. Thus, the information at issue in this case is at the highest end of the spectrum that leads to a finding of the existence of standing.

The final factor courts consider is whether the data at issue has been misused. *Id.* at 1254. In these cases that comprise the split, the data gets misused when third parties access the data. True, there is no allegation of potential misuse of data by third parties in today's case. However, the data at issue in those cases was turned over voluntarily by the plaintiffs; it was the potentiality that third parties would access the information that constituted the alleged harm. Here, in contrast, Patel et al never gave away their biometric information—Facebook itself acquired that information on its own. Further, it allegedly took that information without the consent of Patel et al. Thus, the data at issue in this case has already been allegedly misused; it was allegedly acquired in a manner inconsistent with law. On this factor, the case below is consistent with the themes of the circuits. In sum, even when analyzed among the differing circuits, the facts of this case support a finding that Patel et al have suffered a harm sufficient to establish an injury in fact.

4. As a final matter, this case would be a terrible vehicle to resolve the aforementioned circuit split. Every case cited by Facebook save one[2] deals with the same issue: whether an increased risk of identity theft is sufficient to create standing. It would thus be quite cumbersome to use a case about biometric data to resolve a circuit split on identity theft stemming from stolen account numbers and/or social security numbers. It is true that Ninth

[2] *EPIC* does not fall into the category but, as mentioned above, the D.C. Circuit does have another case that is more on point, *Attias*, and that case fits in with the other identity theft cases. Moreover, this case is likewise a poor vehicle to deal with the issue raised in *EPIC*. First, while BIPA does require information be given like the statute in *EPIC*, the basis for the present suit is predicated on a violation of privacy, not merely access to information as in *EPIC*. Finally, the law in *EPIC* did not have a consent requirement for the information which is present here. *EPIC*, 928 F.3d at 98. That is more than enough to make today's case dissimilar to *EPIC*.

Circuit mentioned the possibility of misuse as a one reason Patel et al have been harmed. Pet. App. 19a. However, that statement was mere dicta and crucially, not necessary for the court's overall holding that BIPA protects one's substantive privacy rights. The Ninth Circuit made that comment in the section of its opinion detailing the purpose of BIPA; the analysis focused on whether the entire law was meant to protect substantive, rather than merely procedural rights. It is the following section where the Ninth Circuit then turned to the specific statutory provisions at issue. It is in that section is where the court specifically finds harm and Facebook does not raise any issues dealing with this section. Thus, the speculation about future harm was superfluous to the Ninth Circuit's overall holding so using this case as a vehicle to address this issue would be an odd choice.

In addition, the information at issue in this case is worlds away from the information in the cases in the circuit split. As the district court acknowledged, "social security numbers do not implicate the kinds of privacy concerns that biometric identifiers do." Pet. App. 38a. Social security, account, and credit card numbers can be changed once compromised. Biometric information cannot. The information at issue in this case is of a different kind and poses an especial kind of risk if compromised compared to the information at issue in the other cases. Using this case a vehicle could very well leave the issues raised by the other cases unaddressed. The risk of identity theft from stolen data is a completely different type of harm than an alleged privacy violation from taking someone's biometric data. Thus, this case would prove an inefficient vehicle for addressing the minor inconsistencies that exist among circuits with respect to analyzing when the potential for identity theft constitutes an injury in fact.